

**THE LAW OF EMPLOYERS' LIABILITY
AND WORKMEN'S COMPENSATION**

THE,
LAW OF EMPLOYERS' LIABILITY
AND
WORKMEN'S COMPENSATION

FOURTH EDITION

BY
THOMAS BEVEN
OF THE INNER TEMPLE, BARRISTER AT LAW

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TO
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HERBERT REED, Esq., K.C.

1 TEMPLE GARDENS,
TEMPLE, E.C.,
November, 1908.

DEAR REED,

In the preface to this book I tell how I was led by you (though there I do not give your name) to try and write a law-book. Will you, then, accept the dedication of this the last-born offspring of your counsel? For I want to make manifest my debt to you and my pride in having your goodwill and friendship.

Sincerely yours,

THOMAS BEVEN.

PREFACE

IN the spring of 1880, when I had almost unbroken leisure, and the most elementary knowledge of any branch of the common law, a friend suggested to me that the best way to learn law and to checkmate laziness, with the incidental advantage of some possible advertisement—to those Argus-eyed wise men, the distributors of legal business—of an utterly unknown name, was to write a law book. He flattered me that my thin veneer of knowledge of law would pass muster in the ranks of that patient crowd to whom paste and scissors are the most efficient instruments in marrying new statutes to fragments of old newspapers. He suggested that the bill then before parliament, which later became the Employers Liability Act, 1880, was the opportunity of my life. He did more: he introduced me to a publisher who was ready to pay money for my toils; and who, when he made his contract, left with me a great parcel of newspaper cuttings, which were a nuisance to me and nothing else; till some years afterwards, I mustered courage, though with many compunctions, to burn them.

It is now twenty-eight years since the book I then wrote appeared. I cannot say that I ever had any pride in my achievement—much humility rather. Still, it did passably well. The first lot of copies, indeed, perished in an accidental fire at the printers; but a second got fairly well circulated, and justified my friend by bringing me some small gains in the shape of county court briefs—in general, very frugally marked—and by making me at home with the itineraries of the London courts. A couple of

years later the publishers told me that I might set to work at a second edition; but I was then much occupied in another direction, and did not act on their permission. Accordingly, there was no second edition, and the book died out. When the Workmen's Compensation Act, 1897, was taking shape I again heard from the publishers; who asked me whether I would bring my old book up to date, and add the Workmen's Compensation Act, 1897, thereto. Thereupon, I inspected a copy that had escaped oblivion, but quickly made up my mind that oblivion was its inevitable fate. I, however, as an alternative, set to work at a book—with the same general arrangement that this has—in three parts, dealing respectively with the general law on employers' liability, the Act of 1880, and the new legislation of 1897.

The common law portion was dealt with in a series of propositions in the manner of a digest, and the two statutes that made up the second and third parts were merely annotated, in the same way as the old book was. Again the venture was mildly successful, and a second edition followed. When a third edition was asked for I had become very dissatisfied with the ineffectiveness of the method of annotating section by section. The method seemed to me as wholly incompatible with any connected view of the subject dealt with as it is with even the meañest condition of literary finish; so I wholly rewrote the portion on the Workmen's Compensation Act in the apodeictic and narrative way. Practical difficulties interfered with my doing the same with the Employers Liability Act, which I promised myself to treat harmoniously, if ever I had the opportunity.

When the Act of 1906 was maturing I again heard from my publishers. I was then in the thick of other work, and could not undertake at the moment either a new book

or a new edition. But when I finished the book on which I was then working the practical difficulty in the way of dealing as I wanted with the Employers Liability Act was moved out of my path; and, in this fifth attempt, I was at liberty to try to do something on a reasonably complete and consistent plan. The result is now before the reader for his judgment.

But why all this explanation? Mainly because I want to show that I have not to justify my right to exist against the crowd of my competitors, six or seven and twenty of them, but only to continue to exist; since my appearance in this field is before that of any of them, at least of any who continues anywhere nearly up to date; and to hint that here it is to be found what may not be elsewhere similarly treated.

The distribution of matter is the same as in the old book. The first part deals with the law apart from the Employers Liability Act, 1880, and is mainly carried on from the former edition, with about twenty-five per cent. of additions. In no region of the common law are its prevailing merits of flexibility and adaptability more strikingly manifested than in this. Among the judicial decisions of the past five and twenty years which are here recorded, are some enunciating principles that beyond question would have been scouted, whether as law or logic, by the hard-headed, and, perhaps, (at least in the work of their office) hard-hearted common law judges of the middle of the last century; such, for example (and there are many more of the same type), as the canon in *Williams v. Birmingham Battery and Metal Co.*, [1899] 2 Q. B. 338 at 345, that negatives what was once a universal principle, that every rational human being of full age must be presumed to intend the reasonable and natural consequences of his actions. Yet this novelty in law and paradox in reason

Preface

has passed into the region of the recognised doctrine of the English law with little more than a raised eyebrow of dissent. With judges prepared to go so far along with popular sentiment the common law would probably readily have been moulded to modern sentiment if time had only been given it to develop, without the butcherly methods by which sometimes legislation works.

The second part of this book deals with the Employers Liability Act, 1880—no longer annotated as of old—but narratively and apodeictically treated. The text of the Act is plainly printed at the beginning of this part without note or comment of any sort. At the foot of the page there are numerical references to the places in the treatise where the authorities are marshalled, or the text of the Act is discussed.

I was confirmed in the advantage of this way of treatment very shortly after my last edition was published, in which it was applied to the Workmen's Compensation Act (as it continues to be in this present) when I met a judge into whose court very many of the cases under the Act find their way. He stopped me and said: "I use your book in my court. It is a very good one. The chief advantage of it is that you print the Act in legible type unnumbered with note or comment, so that one can see what it says." If my present book has no other merit, at least it retains this. If note or comment is a comfort to any, he can revel in them, perhaps, more abundantly than elsewhere.

The case law under the Employers Liability Act, 1880, is now pretty nearly complete: there are few problems that are not solved by authority; and the Act is become assimilated with the common law. The note of the Act is, that negligence connotes liability, with the saving that the employer is not chargeable where he has

used due care in engaging his workmen, from results accruing from their inherent imperfections, whether of temper or training, that he has been unable to discover. A perfect workman is even harder to come by than a perfect machine, and the employer's obligation in each case is not dissimilar. Certain—maybe irrational—exceptions to this principle have been—perhaps summarily, but not unwisely—brushed away.

The Act has been adopted—sometimes textually—in our Colonies and through the United States; so that my analysis has been minute, although, I hope, not overlaid with excessive detail.

The third part of this book deals with the Workmen's Compensation Act, 1906. I have yielded to the temptation of putting patches of the old cloth into a new garment. Now that the total work is before me I see that I have, in consequence, often failed in brevity, and, I fear, occasionally in clearness, in not, as I had better have done, casting aside all the old and rewriting all. But—

“What is writ is writ.”

Would it were worthier!”

The Act does not readily lend itself to the application of familiar legal principles. The method of dealing with “serious and wilful misconduct,” “industrial diseases,” and in this connection with fraudulent misrepresentation “not in writing,” “illegitimate children,” “casual employment,” “concurrent contracts,” to mention only a few of its features, requires a faculty of mental adjustment, perhaps not ordinarily possessed, save by the philosophers of the Trade Unions or politicians panting for a seat in Parliament on any terms. The note of all this seems not inaptly summed up in the formula, “The real friend is *Long*, not *Short*.”

Nevertheless, it is a vast improvement on the bungling old Act with its off absurdities. There is nothing in the

new quite so humorous as that provision of the old (in the light of the illumination of it by the Court of Appeal) that a loose board thrown on the roof of a house may possibly be a "scaffolding;" e.g. *Veauzy v. Chatte*, [1902] 1 K. B. 494. Still those old brocades of the Common law: *Culpa tenet suos auctores tantum*, and, "loss lies where it falls," are very despitefully entreated; and a principle that industry must maintain its "wounded soldiers," proportionably made much of; while great gaps are hewn in the logical symmetry of our knowledge in the cause of brotherly love—largely at our neighbour's cost.

Yet both men individually, and society at large, have a wonderful power of adapting themselves to their environment. As the old order passes away, the new will have to settle many, at first sight, insoluble problems with political economy and political philosophy; but the cruder aspects of incongruity will doubtless be toned down as the new system develops itself in the hands of the experienced judges of the Court of Appeal, who already, in a series of notable judgments (which it is the fortune of the late appearance of this book to be able to include and to study) have laid down sound principles for its building up.

Hardship and suffering must be caused in the adjustment of the old habits to the new principles; and the indications are that on the working classes will fall the stress of them. "Too old at forty" is a terrible, even if true, verdict; and an old age pension at seventy does not lighten the burden of the intervening years. It is not the less certain that the burden will be lightened in ways we cannot exactly forecast, but which must follow from those principles—of recognition of the rights of others—that are at the root of all systems of organised society.

The appendix is of unreasonable size, though I have striven to keep it in bounds. The Workmen's Compensation

Act was at first intended to be so simple that a workman, without aid of counsel or solicitor, should be able to get the advantage it gives him from his employer. To work out this object, a power to make rules is given to a body of County Court Judges. Their first effort in simplifying produces 85 rules, some of which meander through pages of print, and are made, if it were possible, more intolerable by 67 forms attached to them by way of appendix. Then, within a twelve-month, pages more of rules and forms are produced. The Treasury joins in showering its benefit of rules on the workman, and so does the Home Secretary, and so do Treasury and Home Secretary jointly, and so does the Registrar of Friendly Societies.

I hardly venture to groan under this pestilent abuse by all these high authorities of the power to make rules. This is only a somewhat exaggerated and flagrant instance of what is being done on all sides every day, from the by-laws of a water board or a rural district sanitary authority, to the regulations of the Inland Revenue Authorities.

We live under a network of by-laws and regulations, which, if not more indulgently administered than made, would make reasonably comfortable existence impossible. It is a pity that the reasonable methods of the common law are not more trusted to, and that, instead, resort is made on the slightest or no provocation to the peddling pedantries of indefinite code making.

The Table of Statutes is the work of Mr. H. W. Prichard, of Gray's Inn, who has also helped me very considerably with the Index, and taken the entire charge of seeing it through the Press.

The Table of Cases is the joint work of Mr. H. W. Prichard and of Mr. Harold W. Pollock, of the Inner Temple, joint editor of the last edition of Russell on Arbitration.

The list of *Corrigenda* is long and requires explanation and apology. The proof sheets of the earlier portion of the book, all that portion which precedes the Workmen's Compensation Act, 1906, were revised by me during the long vacation at a distance from London where I had very few trustworthy reference books at hand. I depended, for that minute accuracy which is so necessary, on a method of checking references that I had several times previously successfully used; but which through a misunderstanding failed me on this occasion; but this breakdown was not discovered by me till the sheets to page 295 were printed off. Then Mr Harold W. Pollock most generously volunteered the exasperating work of checking every reference throughout the book. The minute accuracy with which he has worked is manifest not only in the long list of *corrigenda*, but in the nature of most of them. I hope his labours will countervail my oversights; for which, with those others of style, treatment or judgment, that the critical reader may find, I humbly ask the indulgence of all who do me the favour to use my book.

THOMAS BEVEN.

1 TEMPLE GARDENS,
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TABLE OF CASES

	PAGE
Abbott v. Motte, see Hughes v. Motte	
Abel v. Lee, (1871), 1 L. R. 6 C. P. 365, 19 L. J. C. P. 151, 23 L. T. 811, 19 W. R. 625	362
Aberdeen Steam Trawling and Fishing Co. v. Coll, 15 Sc. L. R. 247, see Coll v. Aberdeen, etc., Fishing Co.	
Adcock v. Dale, (1851), 11 C. B. 378, 20 L. J. C. P. 233, 2 L. M. & P. 133, 15 Jur. 1012	362
Abrahamson v. Abrahams v. Bullock, (1902), 86 L. T. 596, 50 W. R. 626, 188 L. R. 701	70, 110
Abraham v. Reynolds, (1869), 5 H. & N. 111, 1 L. T. 130, 8 W. R. 181, 6 J. R. (N. S.) 53	13
Abrahams v. Deddon, 1891, 1 Q. B. 516, 60 L. J. Q. B. 238, 61 L. T. 690, 19 W. R. 182, 55 L. P. 212, 7 T. L. R. 117	151, 153
Aburn Coal Co. v. Southon, 1903 A. C. 806, 72 L. J. K. B. 691, 89 L. T. 103, 19 L. L. R. 579, 5 W. C. C. 125	532
Adam v. British and Foreign Steamship Co., Ltd., (1898), 2 Q. B. 190, 67 L. J. Q. B. 811, 79 L. T. 11, 11 L. L. R. 510, 8 Asp. M. C. 120	103
Adams v. Tane-shin A. Yon-shin Ry. Co., (1869), 1 L. R. 1 C. P. 59, 38 L. J. C. P. 277, 20 L. T. 850, 17 W. R. 881	52
Adams v. Nightingale, (1882), 72 L. T. newspaper, 121	240
Adams v. Shaddock, 1905, 2 K. B. 859, 75 L. J. K. B. 7, 95 L. T. 725, 61 W. R. 367, 22 T. L. R. 15, 8 W. C. C. 58	509
Adamson v. Jarvis, (1827), 1 Bing. 60, 12 Moore C. P. 241, 5 L. J. (1) S. C. P. 68, 29 R. R. 201	154
Aldington v. Conyngham, 1898, 2 Q. B. 192, 67 L. J. Q. B. 926, 79 L. T. 233	654
Atkun v. Newport Shipway Dry Dock, (1885), 1 P. L. R. 527	200
Allen v. Flood, (1898), A. C. 1, 67 L. J. Q. B. 119, 77 L. T. 717, 46 W. R. 258, 62 J. P. 295, 11 T. L. R. 125	15
Allen v. L. & S. W. Ry. Co., (1870), L. R. 6 Q. B. 65, 40 L. J. Q. B. 55, 23 L. T. 612, 19 W. R. 137, 1 J. Cox C. C. 621	153
Allen v. New Gas Co., (1870), 1 Ex. D. 251, 45 L. J. Ex. 668, 84 L. T. 541	80, 79
Allmarch v. Walker, (1885), 54 Law T. newspaper, 385	182, 206
Allsop v. Allsop, (1860), 5 H. & N. 511, 29 L. J. Ex. 815, 2 L. T. 220, 40 J. R. (N. S.) 433, 8 W. R. 119	5
Allsop v. Allsop v. Yates, (1877), 2 H. & N. 768, 27 L. J. Ex. 156	27, 70
Alton v. Midland Ry. Co., (1865), 19 C. B. N. S. 213, 31 L. J. C. P. 292, 12 L. T. 701, 18 W. R. 918, 11 Jur. (N. S.) 672	4, 416

	Page
Anderson v. Blackwood, (1896), 13 R. 143, 23 Sc. L. R. 227 . . .	91
Anderson v. Haydon, [1903] 1 K. B. 589, 72 L. J. K. B. 232, 83 L. T. 319, 51 W. R. 399, 19 T. L. R. 237, 9 Asp. M. C. 845 . . .	398
Anderson v. William Baird & Co., (1903), 5 F. 373, 10 Sc. L. R. 263, 10 No. L. T. 525 . . .	378
Andrew v. Fawcett Industrial Society, Ltd., [1901] 2 K. B. 32, 73 L. J. K. B. 510, 90 L. T. 611, 32 W. R. 451, 64 J. P. 400, 20 T. L. R. 429, 6 W. C. C. 11 . . .	379
Andrews v. Andrews & Meaus, [1908] 2 K. B. 507, 21 T. L. R. 709 . . .	508
Andrews v. Barnes, (1888), 39 Ch. D. 131, 57 Ch. J. Ch. 694, 58 L. T. 718, 36 W. R. 705, 54 J. P. 1, 1 T. L. R. 609 . . .	417
Anglo-American Oil Co. v. Manning, [1908] 1 K. B. 546, 77 L. J. K. B. 275, 98 L. T. 570, 72 J. P. 1, 24 T. L. R. 215, 6 L. C. R. 279 . . .	150, 155
Anglo-Argentine Live Stock & Produce Agency v. Pampsey Ship-ping Co., [1899] 2 Q. B. 101, 68 J. P. 1 Q. B. 200, 81 L. T. 296, 48 W. R. 64, 15 T. L. R. 172 . . .	151
Angus v. Finlaid, (1887), 21 Sc. L. R. 247, see Finlaid v. Angus . . .	
Angus v. London, Tilbury and Southend Ry. Co., (1900), 22 T. L. R. 222 . . .	21
Anon., (1899), Times newspaper, 31st January . . .	611
Anon., (1896), 1 Dyer v. B. & G. Eng. Rep. 72 (10) . . .	51
Anon., (1811), Y. B. 9 H. VI. 63 b . . .	145
Appleby v. Franklin, (1886), 17 Q. B. D. 91, 55 L. J. Q. B. 123, 51 L. T. 135, 34 W. R. 211, 59 J. P. 394, 2 T. L. R. 170 . . .	104
Appleby v. Horsley Co., (1889), 2 Q. B. 521, 68 L. J. Q. B. 892, 80 L. T. 853, 17 W. R. 614, 15 T. L. R. 410, 1 W. C. C. 101 . . .	511, 521, 530
Archer v. Jann, (1902), 2 B. & S. 61 67, 31 L. J. Q. B. 151, 8 Inn. (N. S.) 169, 6 L. T. 167, 10 W. R. 189 . . .	201
Archibald Finnie & Son v. Duncan, see Finnie v. Duncan . . .	
Armistead v. Lancashire & Yorkshire Ry. Co., [1902] 2 K. B. 178, 71 L. J. K. B. 778, 86 L. T. 481, 66 J. P. 611, 18 T. L. R. 648, 4 W. C. C. 5 . . .	302, 378, 391
Arnold v. Delamare, (1722), 1 Strange 501, 1 Sm. L. C. (11th ed.) 856 . . .	81
Armour v. Hall, (1884), 11 L. S. 711 . . .	34
Armstrong v. S. E. Ry. Co., (1847), 11 Jur. 758 . . .	109
Ashworth v. Stanwix, (1861), 3 L. & E. 701, 80 L. J. Q. B. 183, 4 L. T. 85, 7 Jur. N. S. 407 . . .	25
Ashton Smith v. Owen, [1906] 1 Ch. 179, 75 L. J. Ch. 181, 94 L. T. 42, 22 T. L. R. 182, 10 Asp. M. C. 164 . . .	452
Assop or Alsop v. Yates, (1877), 2 H. & N. 708, 27 L. J. Ex. 156 . . .	27, 70
Atkinson v. Lumb, [1908] 1 K. B. 861, 72 L. J. K. B. 460, 84 L. T. 789, 51 W. R. 516, 67 J. P. 414, 19 T. L. R. 412, 5 W. C. C. 106 . . .	499
Atkinson v. Newcastle and Gateshead Waterworks Co., (1877), 2 Ex. D. 441, 46 L. J. Ex. 775, 36 L. T. 761, 25 W. R. 704 . . .	251
A.-G. v. Brunning, (1840), 8 H. L. C. 213, 30 L. J. Ex. 379, 6 Jur. (N. S.) 1088, 3 L. T. 86, 8 W. R. 362 . . .	108
A.-G. v. Davison, (1825), 1 McClell. & Don. 160, 29 R. R. 774 . . .	629

Table of Cases

xxiii

	PAGE
A.	
<i>A. v. Horner</i> , (1885), 11 App. Cas. 66, 55 L. J. Q. B. 193, 51 L. T. 281; 94 W. R. 641, 50 J. P. 661, 2 T. L. R. 209	500
<i>A. G. v. Margate Pier and Harbour Co.</i> , [1900] 1 Ch. 749, 69 L. J. Ch. 931; 82 L. T. 118, 48 W. R. 518, 64 J. P. 405	246
<i>A. G. v. Siddons</i> , (1890), 1 Tyn. 41, 1 C. & J. 220, 9 L. J. (C. S.) 155	155
<i>A. G. v. Weymouth (Lord)</i> , (1743), Ambler 20	123
<i>Attwood v. Small</i> , (1814), 6 Cl. & F. 232, sub nom. <i>Small v. Attwood</i> , 2 Jur. 200, 226, 216	81
<i>Avery v. Wood</i> , [1891] 1 Ch. 115, 65 L. T. 122, 39 W. R. 577, 5 T. L. R. 612	217
<i>Ayres v. Buckeridge</i> , [1902] 1 K. B. 57, 71 L. J. K. B. 28, 85 L. T. 172, 50 W. R. 115, 65 J. P. 801, 18 T. L. R. 20, 1 W. C. C. 120	210
<i>Ayres v. Bull</i> , (1889), 5 T. L. R. 202	165, 185, 192
B.	
<i>Baker & Dick, Ken & Co.</i> , 1906 A. C. 325, 75 L. J. K. B. 560, 94 L. T. 802, 22 T. L. R. 518, 8 W. C. C. 10	504
<i>Bachhouse v. Armstrong, Whitworth & Co.</i> (1890), 106 Law Times newspaper, 261	534
<i>Bachwood's case</i> , (1693), 1 Vern. 152, 1 Eq. Cas. Ab. 62, pl. 1, 2, 2 Cas. in Ch. 190, 23 Eng. Rep. 381	589
<i>Bacon v. Dawes & Co.</i> , (1887), 3 T. L. R. 557	180, 175, 186
<i>Baddeley v. Granville (Earl)</i> (1887), 19 Q. B. D. 123, 56 L. J. Q. B. 501, 57 L. T. 264, 36 W. R. 61, 51 J. P. 822, 3 T. L. R. 559	20, 21, 202
<i>Badische Anilin und Soda Fabrik v. Basle Chemical Works, Bindschedlen</i> , [1903] A. C. 200, 67 L. J. Ch. 111, 77 L. T. 571, 46 W. R. 25, 11 T. L. R. 82	53
<i>Bagnall v. Lavinston</i> , [1907] 1 K. B. 591, 76 L. J. K. B. 234, 96 L. T. 181, 23 T. L. R. 160, 9 W. C. C. 100	263, 443, 441
<i>Bagot v. Easton</i> , (1877), 7 Ch. D. 1, 47 L. J. Ch. 225, 37 L. T. 169, 26 W. R. 66	255
<i>Bailey v. G. H. Kenworthy, Ltd.</i> , 1908 1 K. B. 117, 77 L. J. K. B. 230, 98 L. T. 327, 21 T. L. R. 181	521, 511
<i>Bailey v. Neal</i> , (1884), 5 T. L. R. 20	11, 95
<i>Bailey v. Plant</i> , [1901] 1 K. B. 31, 70 L. J. K. B. 61, 83 L. T. 459, 19 W. R. 105, 65 J. P. 52, 17 T. L. R. 18, 3 W. C. C. 209	846, 639, 669
<i>Bailey v. Plant</i> (1901), 17 T. L. R. 119, 3 W. C. C. 207	661
<i>Bailiffs of Romney Marsh v. Trinit. House</i> , (1870), L. R. 5 Ex. 204; (1872), L. R. 7 Ex. 247, 41 L. J. Ex. 106, 22 L. T. 446, 18 W. R. 869, 20 W. R. 952	69
<i>Baird v. Hugginbotham</i> , (1901), 3 F. 673, 38 Sc. L. R. 479, 8 Sc. L. T. 497	418
<i>Baird (Wm.) & Co. v. Burley</i> , (1905), 15 Sc. L. R. 116	378
<i>Baird (Wm.) & Co. v. Kane</i> , (1905), 7 F. 161, 42 Sc. L. R. 347; 12 Sc. L. T. 625, 697	680
<i>Baird (Wm.) & Co. v. McWhinnie</i> , [1904] S. C. 140, 15 Sc. L. R. 338	615
<i>Baird (Wm.) & Co. v. Savage</i> , (1906), 8 F. 188, 43 Sc. L. R. 300	476
<i>Baird (Wm.) & Co. v. Stevenson</i> , [1907] S. C. 1259, 18 Sc. L. R. 864	667
<i>Baker v. Bolton</i> , (1808), 1 Camp. 493, 10 R. R. 784	102

	Page
<i>Baker v. Snell</i> , [1908] 2 K. B. 625, 24 T. L. R. 811	50
<i>Bank of New South Wales v. Quiston</i> , (1879), 4 App. Cas. 370, 48 L. J. P. C. 250, 40 L. T. 500	151
<i>Barbier v. Baill</i> , (1831), 10 T. L. R. 341	209, 218
<i>Barclay, Curle & Co. v. Osborn or McKinnon</i> , [1901], 1 T. 136, 34 Sc. L. R. 321	198
<i>Barnard Castle Urban Council v. Wilson</i> , [1902], 2 Ch. 716, 71 L. J. Ch. 825, 87 L. T. 279, 51 W. R. 102, 18 T. L. R. 719	460
<i>Barnes v. Ward</i> , (1879), 9 C. B. 332, 2 C. & K. 661, 19 L. J. C. P. 195, 14 Jur. 331	101
<i>Barnett v. Jones</i> , [1870], 11 R. 5 C. L. 110, (1872), 11 R. 6 C. L. 247	115
<i>Barratt v. Midland Ry. Co.</i> , (1859), 1 T. & F. 361	37
<i>Barrow v. Arnould</i> , (1840), 8 Q. B. 595, 10 Jur. 119	15
<i>Barry v. Midland Ry. Co.</i> , (1897), 11 R. 1 C. L. 130	113
<i>Barry Ry. Co. v. White</i> , (1901), 17 T. L. R. 614	71
<i>Bartoll v. Gray</i> , [1902] 1 K. B. 225, 71 L. J. K. B. 115, 85 L. T. 658, 50 W. R. 310, 66 J. P. 908, 18 T. L. R. 70, 1 W. C. C. 95	193
<i>Bartonhill Coal Co. v. McGuire</i> , [1859], 1 Mac. 1 (H. L. Sc.) 300, Paterson 789, 1 Jur. (N. S.) 772	11, 10
<i>Bartonhill Coal Co. v. Reid</i> , (1858), 3 Mac. 1 (H. L. Sc.) 266, 1 Paterson 785, 4 Jur. (N. S.) 767	11, 21, 24, 31, 17, 227
<i>Barwick v. English Joint Stock Bank</i> , [1867], L. R. 2 Ex. 259, 36 L. J. Ex. 147, 16 L. T. 101, 15 W. R. 847	12, 112, 113
<i>Bastin v. London and County Printing Works</i> , [1899] 1 Q. B. 901, 68 L. J. Q. B. 622, 80 L. T. 737, 17 W. R. 639, 63 J. P. 149, 15 T. L. R. 311	24
<i>Batchelor v. Pigeon</i> , [1883], 11 Q. B. 171, 19 L. T. 614	10, 57
<i>Bate v. Wanner</i> , (1849), 5 T. L. R. 582	253
<i>Bathgate v. Caledonian Ry. Co.</i> , (1901), 1 T. 111, 39 Sc. L. R. 216, 9 Sc. L. T. 331	301
<i>Baile v. New York & Harlem Railroad Co.</i> , (1871), 59 N. Y. 156	24
<i>Baumwoll Manufactur von Scheibler v. Funness</i> , [1893] A. C. 8, 62 L. J. Q. B. 201, 68 L. T. 1, 9 T. L. R. 71, 7 Asp. M. C. 268	111, 185
<i>Baxter v. Wyman</i> , (1888), 1 T. L. R. 255	175, 185
<i>Bayley v. Manchester, Sheffield & Lincolnshire Ry. Co.</i> , (1873), 11 L. 8 C. P. 118, 42 L. J. C. P. 78, 23 L. T. 366	112, 117
<i>Bazalgette v. Low</i> , (1865), 3 Ex. 401, 21 L. J. Ch. 368, 3 W. R. 866	392
<i>Bendon v. Parrott</i> , (1871), L. R. 6 Q. B. 718, 10 L. J. M. C. 200, 19 W. R. 1111	276
<i>Beard v. London General Omnibus Co.</i> , [1900] 2 Q. B. 540, 69 L. J. Q. B. 825, 83 L. T. 362, 48 W. R. 688, 16 T. L. R. 199, 50, 145, 151	
<i>Beath & Keay v. Ness</i> , (1904), 6 T. 165, 41 Sc. L. R. 119	614, 615
<i>Beavan v. Crawshaw Bros.</i> , see <i>Bevan v. Crawshaw Bros.</i>	
<i>Beckett v. Manchester Corporation</i> , (1889), 52 J. P. 346	345
<i>Beckley v. Scott</i> , [1902] 2 Ir. R. 501, W. N. (1908) 178, 86 Ir. L. T. 180	418, 421, 423, 426

Table of Cases

XXV

	PAGE
Bedwell v Golding, (1902), 18 T. L. R. 436	105
Beer v Owens & Sons, (1900), 3 F. 439, 37 Sc. L. R. 368, 7 Sc. L. T. 362	487, 489
Beever v Hanson Dair & Co, (1880), 25 L. J. Notes of Cases 182	19
Bell v G. N. Ry. Co. of Ireland, (1890), 26 L. R. Ir. 128	84
Bell v Wilson, (1866), L. R. 1 Ch. 303, 35 L. J. (C) 337, 14 F. T. 115, 14 W. R. 493, 12 Ann. (N. S.) 263	277
Bennett v Aird, (1869), 107 L. T. newspaper, 550, 1 W. C. C. 138	511
Bennett v Stone, (1902), 1 Ch. 226, 71 L. J. Ch. 60, 85 L. T. 753, 50 W. R. 118	395
Bennett v Worthe & Co, (1880), 1 F. 857, 36 Sc. L. R. 643, 7 Sc. L. T. 10	610, 612
Benson v Lancashire & York-shire Ry. Co., (1901) 1 K. B. 212, 73 L. J. K. B. 122, 80 L. T. 715, 92 W. R. 243, 68 J. P. 149, 20 T. L. R. 130, 10 W. L. 20	383
"Bermina," The, see Mills v Armstrong	
Berry v Perry, (1646), 3 Bulst. 62, 1 Rolle Rep. 375, 81 Eng. Rep. 51, sub nom. Berry v Perring, Cro. Jac. 369, Moor 849	629
Bett v Dalmeny Col. Co., (1900), 7 F. 787, 42 Sc. L. R. 648, 44 L. T. 165	25, 251, 254
Bevan or Bevan v Chawshay Bro., (1902), 1 K. B. 25, 71 L. J. K. B. 49, 85 L. T. 416, 50 W. R. 98, 48 F. L. R. 17, 4 W. C. C. 110	100, 550, 620
Biddle v Hart, (1907) 1 K. B. 619, 76 L. J. K. B. 448, 97 L. T. 66, 23 T. L. R. 262	163, 188
Binning v Gaston & Sons, (1900), 8 F. 107, 43 Sc. L. R. 312	667
Bird v Holbrook, (1829), 4 Bun. 628, 4 M. & P. 667, 6 L. J. (O. S.) C. P. 119, 20 R. R. 657	87
Bishop v Lotts, (1858), 1 F. & F. 404	275
Birtwistle v Hindle, see Hindle v Birtwistle	
Biscup v L. & S. W. Ry. Co., (1907) 1 K. B. 299, 76 L. J. K. B. 703, 96 L. T. 790, 23 T. L. R. 471, 9 W. C. C. 99	410
Black v Christchurch Finance Co., (1891) 1 K. B. 48, 61 L. J. P. C. 92, 70 L. T. 77, 58 J. P. 342, 6 R. 394	77
Black v North British Ry. Co., (1905) 8 C. 144, 45 Sc. L. R. 310	107
Black v Ontario Wheel Co., (1890), 19 Ont. R. 578	26, 179
Blackburn Corporation v Southerton, (1902) 1 K. B. 594, 71 L. J. K. B. 590, 86 L. T. 64, 60 J. P. 142, 48 F. L. R. 416	424
Blackman v London Brighton & South Coast R., (1869), 17 W. R. 769	60
Blades v Hughes, (1865), 11 H. L. 621, 20 C. B. N. S. 211, 34 L. J. C. P. 286, 12 L. T. 615, 13 W. R. 927, 11 Jur. (N. S.) 701	154
Blake v Midland Ry. Co., (1852), 180 L. B. 396, 21 L. J. Q. B. 238, 16 Jur. 562	109, 113
Blake v Midland Ry. Co., (1904) 1 K. B. 506, 73 L. J. K. B. 179, 90 L. T. 443, 68 J. P. 215, 20 T. L. R. 491, 9 W. C. C. 163...	667
Blake v Shaw, (1860), Johns. 732, 8 W. R. 410	182
Blamires v Lancashire & Yorkshire Ry. Co., (1873), L. R. 8 Ex. 283, 42 L. J. Ex. 182	25, 62
Blenkinsop v. Ogden, (1895), 1 Q. B. 783, 67 L. J. Q. B. 537, 78 L. T. 554, 46 W. R. 542, 14 T. L. R. 360	248, 249

<i>Howe v. G. W. Ry. Co.</i> , (1872), L. R. 7 C. P. 655; <i>sub nom</i> <i>G. W. Ry. Co. v. Howe</i> , 41 L. J. Q. P. 268, 20 L. T. 888, 20 W. R. 776	75
<i>Bloett v. Sawyer</i> , (1804), 1 K. B. 271, 79 L. J. K. B. 155, 80 L. T. 658, 52 W. R. 501, 68 J. P. 110, 20 T. L. R. 105, 6 W. C. C. 16	387
<i>Blivh v. Birmingham Waterworks Co.</i> , (1856), 11 Ex. 781; 25 L. J. Ex. 212, 4 W. R. 201, 2 Jur. (N. S.) 131	69
<i>Bonae Spinning Co., Ltd. v. McVann</i> , (1901), 38 Sc. 17 R. 772, <i>see</i> <i>McVann v. Bonae</i>	
<i>Bolch v. Smith</i> , (1862), 7 H. & N. 737, 31 Q. J. Ex. 201, 6 L. T. 158, 8 Jur. (N. S.) 197, 10 W. R. 187	171
<i>Bolingbroke (Lord) v. Swindon Local Board</i> , (1874), L. R. 9 C. P. 575, 43 L. J. C. P. 257, 30 L. T. 721, 23 W. R. 17	152
<i>Bonaker v. Evans</i> , (1850), 16 Q. B. 162, 20 L. J. Q. B. 117, 15 Jur. 460	627
<i>Bond v. Toronto Ry. Co.</i> , (1895), 22 Q. B. 1 B. 78	185
<i>Bond v. Wilson</i> , (1908), 24 T. L. R. 248	61
<i>Booker v. Higgs</i> , (1887), 3 T. L. B. 618	28, 11, 171, 205, 221
<i>Bortick or Borbeck v. Head, Wightson & Co.</i> , (1855), 5 L. T. 909	
84 W. R. 102, 50 J. P. 327, 2 F. L. B. 101	2 P. 210, 172, 522, 551, 568
<i>Booth v. Rainey Urban District Council</i> , (1900), 2 Q. B. 616, 61 L. J. Q. B. 845, 84 L. T. 158, 61 J. P. 600, 16 F. L. B. 540	247
<i>Bowell's case</i> , (1846), 6 C. B. Rep. 48 b, 77 Eng. Rep. 326	626
<i>Bound v. Lawrence</i> , (1892), 1 Q. B. 226, 61 L. J. M. C. 21, 65 L. T. 844, 40 W. R. 1, 56 J. P. 118, 8 T. L. R. 1	271
<i>Bourko v. Cork & Mercator Ry. Co.</i> , (1879), 4 L. R. 16 682	110
<i>Bovall v. Wood</i> , (1813), 2 M. & S. 21	201, 429
<i>Bowden v. Barron Brothers</i> , (1901), 3 W. C. C. 215	681
<i>Bowen v. Evans</i> , (1818), 3 Ex. 111, 6 D. & L. 191, 18 L. J. Ex. 38	250
<i>Bewen v. Lockin</i> , (1856), 6 B. & B. 581, 25 L. J. Q. B. 171, 27 L. T. (O. S.) 168, 4 W. R. 600, 2 Jur. (N. S.) 1187	275
<i>Bowie v. Robert Rankin & Co.</i> , (1886), 13 R. 851, 23 Sc. 1 R. 706	169
<i>Bowler v. Evans</i> , (1857), 15 Q. B. 565, 54 L. J. Q. B. 421, 54 L. T. 801, 31 W. R. 695, 1 T. L. R. 171	101
<i>Boyle v. Smith</i> , (1906), 1 K. B. 432, 75 L. J. K. B. 282, 94 L. T. 30, 64 W. R. 519, 70 J. P. 115, 22 T. L. R. 200	155
<i>Brace v. Calder</i> , (1895), 2 Q. B. 253, 64 L. J. Q. B. 582, 11 R. 171, 72 L. T. 829, 59 J. P. 621, 11 L. L. R. 130	11
<i>Bradburn v. G. W. Ry. Co.</i> , (1874), L. R. 10 Ex. 1, 44 L. J. Ex. 9, 81 L. T. 464, 28 W. R. 468	114
<i>Bradbury v. Bedworth Coal and Iron Co.</i> , (1900), 2 W. C. C. 188; <i>Times newspaper</i> , 17th March	561, 573
<i>Bradshaw v. Lancashire & Yorkshire Ry. Co.</i> , (1875), L. R. 10 C. P. 149; 44 L. J. C. P. 148, 31 L. T. 847, 24 W. R. 310	115
<i>Bramall v. Lees</i> , (1857), 29 L. T. (O. S.) 111	110
<i>Brannigan v. Robinson</i> , (1892), 1 Q. B. 844; 61 L. J. Q. B. 202, 66 L. T. 647; 56 J. P. 828, 8 T. L. R. 244	168, 173, 184, 188
<i>Branwell or Branwell v. Penneck</i> , (1827), 7 B. & C. 336, 1 M. & Ry. 409, 6 L. J. (O. S.) M. C. 47	272

Table of Cases

KXVII

	PAGE
<i>Brennan v. Dublin United Tramway Co.</i> , [1901] 2 I. R. 241; 84 H. L. T. 113 ...	486
<i>Bridge v. Grand Junction Ry. Co.</i> , (1834), 3 M. & W. 24 ...	86
<i>Bridges v. North London Ry. Co.</i> , (1874), L. R. 7 H. L. 218; 43 L. J. Q. B. 151, 30 L. T. 814, 24 W. R. 62 ...	82
<i>Briggs v. Oliver</i> , (1866), 1 H. & C. 408, 35 L. J. Ex. 168, 14 L. T. 412, 14 W. R. 654 ...	75
<i>Briggs v. Upton</i> (1872), L. R. 5 Ch. 356, 41 L. J. Ch. 519, 26 L. T. 485, 21 W. R. 70 ...	289
<i>Brimston v. Harrison</i> , (1872), L. R. 5 C. P. 547, 41 L. J. C. P. 190, 27 L. T. 99, 20 W. R. 584 ...	151
<i>Brintons, Ltd. v. Innes</i> , (1905) A. C. 230, 74 L. L. K. B. 474, 92 L. T. 558, 53 W. R. 611, 21 T. L. R. 114 ...	55, 314, 352, 365
<i>British Mutual Banking Co. v. Charnwood Forest Ry. Co.</i> , (1887), 18 Q. B. D. 514, 56 L. J. Q. B. 119, 57 L. P. 433, 35 W. R. 590, 52 J. P. 150 ...	12, 148
<i>Britton v. Great Western Cotton Co.</i> , (1872), L. R. 5 Ex. 130, 41 L. J. Ex. 99, 25 L. T. 125, 20 W. R. 525 ...	24, 39, 191
<i>Brookbank, Inc. v. Park, Inc.</i> , (1875), 6 Ch. Div. 358, 16 L. J. Hk. 37, 37 L. T. 282, 25 W. R. 859 ...	592
<i>Brodie v. North British Ry. Co.</i> , (1900), 3 I. P. 70, 38 Sc. L. R. 38 ...	498, 502
<i>Brookbank v. London County Council</i> , (1905) 2 K. B. 507 ...	352
<i>Brinkley v. Caversham Spinning Co., Limited</i> , (1887), 2 T. L. R. 881 ...	160
<i>Bromley, Executrix of, v. Oldham Corporation</i> (not reported), cited <i>Bugg, Employers' Liability</i> , [7th Ed.] 71 ...	245
<i>Brooker v. Watson</i> , (1900), 23 T. L. R. 201, 9 W. C. C. 26 ...	410
<i>Brown v. Butterley Coal Co.</i> , (1885), 53 L. T. 961, 50 L. P. 230, 2 T. L. R. 159 ...	217, 276, 288
<i>Brown v. Eastern & Midlands Ry. Co.</i> , (1889), 22 Q. B. D. 391; 58 L. J. Q. B. 212, 5 T. L. R. 234 ...	60
<i>Brown v. Ford</i> , (1892), 61 L. J. M. C. 110, 66 L. T. 619, 56 J. P. 581, 17 Cox C. C. 599 ...	156
<i>Brown v. Kennell</i> , (1860), 60 Mass. 292 ...	16
<i>Brown v. Lochgelly Iron Co.</i> , 1907 S. C. 198, 41 Sc. L. T. 180 ...	606
<i>Brown v. Scott</i> , (1899), 1 W. C. C. 11, Times new-paper, 12th June ...	389
<i>Bruce v. Barclay</i> , (1900), 15 R. 811, 27 L. L. R. 670 ...	133
<i>Brumer v. Moore</i> , [1901] 1 Ch. 305, 73 L. L. Ch. 67, 30 L. T. 738, 52 W. R. 295, 20 T. L. R. 125 ...	241, 308
<i>Bunsden v. Humphrey</i> , (1881), 11 Q. B. D. 101, 53 L. J. Q. B. 476, 51 L. T. 529, 32 W. R. 901, 19 L. P. 4 ...	115, 255
<i>Brydon v. Stewart</i> , (1857), 2 Macq. (H. L. Sc.) 30, 1 Paterson, 147 ...	11, 22, 138, 373
<i>Bull v. Shoreditch Borough</i> (1902), 67 J. P. 67, 1 L. G. R. 81, 19 T. L. R. 64 ...	72
<i>Bulman v. Robertson</i> , (1895), 1 W. N. (S. & W.) 131 ...	245
<i>Bulmer v. Bidder</i> , (1883), 25 Ch. D. 109, 53 L. J. Ch. 402, 32 W. R. 884 ...	242
<i>Bank v. Midland Ry. Co.</i> , (1883), 47 L. T. 476, 31 W. R. 231 ...	40, 208, 209
<i>Burchell v. Hickson</i> , (1890), 50 L. L. Q. B. 101 ...	97
<i>Burgh v. Legge</i> , (1839), 5 M. & W. 418, 8 L. J. Ex. 258, 7 Dowd. 814 ...	195

	PAGE
<i>Barke v Manchester, Sheffield & Lincolnshire Ry. Co.</i> , (1870), 22 L. T. 442, 28 W. R. 691	76
<i>Burmeser v Burman</i> , (1872), 17 Q. B. 828, 21 L. J. Q. R. 135, 16 C. Jur. 311	265
<i>Burnard v Haggis</i> , (1863), 14 C. B. N. S. 45, 33 L. J. C. P. 189, 8 L. T. 320, 11 W. R. 611, 1 Jun. (N. S.) 325	281
"Burns," <i>The</i> , [1867] P. 137, 76 L. J. P. 41, 96 L. T. 684, 5 L. R. 656, 71 J. P. 191, 21 T. L. R. 123	246
<i>Burus v North British Ry. Co.</i> , (1900), 2 F. 629, 37 Sc. L. R. 418	487
<i>Buton v Denman</i> , (1818), 2 Lx. 167	282
<i>Burr v Theatre Royal, Drury Lane</i> , 1907 F. K. B. 511, 76 L. J. K. B. 479, 96 L. T. 117, 21 T. L. R. 299	35, 42
<i>Burr v William Whiteby, Ltd.</i> , (1902), 19 T. L. R. 117	509
<i>Burrell & Burrell and Warr, Ltd.</i> , (1898), 106 L. T. new-paper, 61	407
<i>Burrows v March Gas and Coke Co.</i> , (1870), L. R. 5 Ex. 67, (1872), L. R. 7 Ex. 96, 11 L. J. Ex. 46, 20 L. T. 318, 20 W. R. 191	55, 64
<i>Burt-Boulton & Hayward v Bull</i> , [1865] 1 Q. B. 276, 64 L. J. Q. B. 232, 71 L. T. 810, 11 W. R. 180, 11 T. L. R. 90, 2 Mans. 94, 14 R. 65	584
<i>Bush v Hawes</i> , [1902] 1 K. B. 216, 71 L. J. K. B. 68, 80 L. T. 507, 50 W. R. 311, 66 J. P. 260, 1 W. C. C. 11	90
<i>Butler v Dunbar</i> , (1891), 7 T. L. R. 287	178
<i>Butterfield v Forester</i> , (1899), 11 East 60, 10 R. R. 131	85
<i>Buttery v Drogheda Corporation</i> , [1907] 2 L. R. 131	98
<i>Butts v Goddard</i> , (1887), 1 T. L. R. 193	292
<i>Byrne v Boodle</i> , (1863), 2 H. A. C. 522, 32 L. J. Ex. 11, 11 L. T. 140, 12 W. R. 279	74
•••	
<i>Cadrow Coal Co. v Gaffney</i> , (1900), 8 F. 72, 38 Sc. L. R. 40, 8 Sc. L. T. 224	210
<i>Cabalane v. North Metropolitan Ry. and Canal Co.</i> , (1896), 12 T. L. R. 611	111
<i>Cain v Frederick Lealand & Co.</i> , [1908] 1 K. B. 111, 77 L. J. K. B. 236, 98 L. T. 127, 21 T. L. R. 186	540
<i>Cairns v Clyde Navigation Trustees</i> , (1908), 25 R. 1021, 35 Sc. L. R. 608, 6 Sc. L. T. 58	41, 140
<i>Caldwell v Mills</i> , (1891), 21 Ont. R. 462	171, 172
<i>Caledon Shipbuilding, etc. Co. v Kennedy</i> , (1900) 8 F. 960, 13 Sc. L. R. 430, 657, 13 Sc. L. T. 901	663
<i>Caledonian Ry. Co. v Bredin</i> , (1900), 2 F. 1138, 87 Sc. L. R. 873, 495, 509	
<i>Caledonian Ry. v. Millholland</i> , [1908] 1 C. 216, 67 L. J. P. C. 1, 77 L. T. 570, 46 W. R. 230, 14 T. L. R. 11	51
<i>Callaghan v. Maxwell</i> , (1900), 2 F. 420, 37 Sc. L. R. 319, 7 Sc. L. T. 339	373, 407
<i>Callender v. Caillon Iron Co.</i> , (1893), 9 T. L. R. 646, (C. V.), (1894) 10 T. L. R. 460 (11 L.)	139
<i>Cameron v. Nystrom</i> , [1903] A. C. 808, 62 L. J. P. C. 85, 68 L. T. 772, 57 J. P. 550, 7 Asp. M. C. 120, 1 R. 212	13, 42
<i>Cameron v. Walker</i> , (1898), 25 R. 449, 35 Sc. L. R. 347	53, 178

Table of Cases

XXIX

	PAGE
<i>Cammick v Glasgow Iron and Steel Co., Ltd.</i> , (1901); 1 K 198; 89 Sc. L. R. 138, 9 Sc. L. T. 218	666
<i>Campbell v Dearborn</i> , (1900), 175 Mass. 183	171
<i>Campbell v Ogd.</i> , (1873), 1 R. 149, 11 Sc. L. R. 51	94
<i>Canavan v John Green & Co.</i> , (1905), 8 F. 275, 11 Sc. L. R. 200...	209
<i>Capel v Child</i> , (1842), 2 C. & J. 538, 1 L. J. Ex. 205, 2 Tr. 689	627
<i>Capell v G. W. Ry. Co.</i> , (1883), 11 Q. B. 10, 315, 52 L. J. Q. B. 945; 48 L. T. 595, 11 W. R. 555	962
<i>Carey v. Boardman's Borough Council</i> , (1903), 67 J. P. 117, 2 L. G. R. 219, 20 T. L. R. 2	247
<i>Carmichael v. Boston etc., Railroad Co.</i> , (1896), 161 Mass. 521	236, 238
<i>Cartee v. Clarke</i> , (1898), 78 L. T. 76, 11 T. L. R. 172	78, 182, 183, 185
<i>Cartier v. Drysdale</i> , (1884), 12 Q. B. D. 90, 53 L. J. Q. B. 557, 32 W. R. 171	260
<i>Castle Spinning Co., Ltd. v. Atkinson</i> , 1905, 1 K. B. 336, 74 L. J. K. B. 265, 52 L. T. 117, 53 W. R. 360, 21 T. L. R. 192, 7 W. C. C. 121	556, 557
<i>Caton v. Caton</i> , (1867), L. R. 2 H. L. 127, 36 L. J. Ch. 886, 16 W. R.	412
<i>Caton v. Sumner and Mosses Iron and Steel Co., Ltd.</i> , (1902), 4 F. 989, 70 Sc. L. R. 762, 10 Sc. L. T. 201	381
<i>Cattemunde v. Atlantic Transport Co., Ltd.</i> , 1902, 1 K. B. 201, 71 L. J. K. B. 173, 85 L. T. 513, 50 W. R. 129, 66 J. P. 1, 18 T. L. R. 102, 1 W. C. C. 28	653, 654, 658, 659
<i>Cavagnaro v. Clark</i> , (1898), 171 Mass. 379	207
<i>Cavenagh v. Parl.</i> , (1896), 23 Ont. V. R. 715	260
<i>Cay v. Caton Co.</i> , (1881), 9 App. Cas. 873, 51 L. J. Adm. 18, 53 L. T. 361, 33 W. R. 281, 7 App. M. C. 471	90
<i>Central Vermont Ry. Co. v. Franchise</i> , (1901), 35 Can. S. C. R. 68	114
<i>Challis v. L. & S. W. Ry. Co.</i> , (1905), 2 K. B. 151, 74 L. J. K. B. 569, 51 L. T. 190, 54 W. R. 613, 21 T. L. R. 186, 7 W. C. C. 23	378
<i>Chambers v. Whitehaven Harbour Commissioners</i> , (1899), 2 Q. B. 132, 68 L. J. Q. B. 710, 80 L. T. 586, 47 W. R. 541, 16 T. L. R. 311, 1 W. C. C. 47	196
<i>Chandler v. Smith</i> , (1899), 2 Q. B. 506, 68 L. J. Q. B. 99, 81 L. T. 317, 45 W. R. 677, 15 T. L. R. 180, 1 W. C. P. 19	116, 563, 573
<i>Chapman v. Rothwell</i> , (1858), E. B. & L. 168, 20 L. J. Q. B. 315, 4 Jur. (N. S.) 1180	293
<i>Chapman, Mosses & Co. v. Auckland Union</i> , (1889), 21 Q. B. D. 294, 58 L. J. Q. B. 501, 61 L. T. 116, 51 J. P. 820	246
<i>Chapman v. Mason</i> , (1905), 21 T. L. R. 231	74
<i>Charles v. Taylor</i> , (1878), 3 C. P. D. 402, 38 L. T. 773, 27 W. R. 32	13, 139
<i>Charleston v. London Tramways Co.</i> , (1888), 1 T. L. R. 157, 629, 86 W. R. 307, 32 Sol. J. 557	152
<i>Chartered Mercantile Bank of India v. Netherlands Steam Naviga- tion Co.</i> , (1883), 10 Q. B. D. 521, 52 L. J. Q. B. 220, 48 L. T. 546, 31 W. R. 115, 17 J. P. 260	16
<i>Chawner v. Cummings</i> , (1866), 9 Q. B. 111, 15 L. J. Q. B. 163, 10 Jur. 454	294

	PAGE
<i>Cheshire v. Barlow</i> , [1906] 1 K. B. 287, 74 L. J. K. B. 178, 92 L. T. 142; 59 V. 922, 21 T. L. R. 130	146
<i>Chesnum & Sons v. Gordon</i> , [1901] 1 K. B. 604, 70 L. J. Q. B. 394; 84 L. T. 137, 49 W. R. 301	638
<i>Chubb v. Hearn</i> , (1874), L. R. 9 Ex. 176, 48 L. J. Ex. 100, 22 W. R. 864	65
<i>Children v. Saxby</i> , (1689), 1 Vern. 207, 1 Eq. Cas. Ab. 15, Pl. 2, 229, Pl. 11, 23 Eng. Rep. 417	81
"Ciree," <i>The</i> , [1906] 1 P. 1, 74 L. J. P. 196, 93 L. T. 640, 21 T. L. R. 527, 10 Asp. M. C. 119	103
"City of Lincoln," <i>The</i> , (1889), 15 P. D. 15, 59 L. J. P. 1, 62 L. T. 49, 88 W. R. 145, 6 Asp. M. C. 175	52
"City of London," <i>The</i> , see <i>Morgan v. Sun</i>	
<i>Clark, In re, Schuler, Ex parte</i> , (1898), 2 Q. B. 330, 67 L. J. Q. B. 759; 78 L. T. 735, 10 W. R. 678, 11 P. L. R. 402, 5 Manson 201	277
<i>Clark v. Adams</i> , (1885), 12 R. 1092, 22 Sc. L. R. 740	211
<i>Clark v. Chambers</i> (1878), 1 Q. B. D. 327, 47 L. J. Q. B. 127, 38 L. T. 454, 26 W. R. 611	71, 93, 94
<i>Clark v. Gas Light and Coke Co.</i> (1905), 21 T. L. R. 181, 7 W. C. C. 119	575, 576
<i>Clark v. London General Omnibus Co.</i> , 1906, 2 K. B. 618, 75 L. J. K. B. 907, 95 L. T. 115, 23 T. L. R. 691	102, 105, 106
<i>Clarke v. Carlin Coal Co.</i> , (1891), 112, 7 F. L. R. 711	107
<i>Clarke v. Holmes</i> , (1864), 7 H. & N. 937, 31 L. J. Ex. 356, 8 Jur. (N. S.) 902, 10 W. R. 405	28, 40, 51, 94, 227, 221
<i>Clarke v. Lewisham Borough Council</i> , (1902), 67 J. P. 195, 1 L. G. R. 64, 19 T. L. R. 62	216
<i>Clarke v. McNaught</i> , (1816), 10 L. J. 38 (Sc.)	274
<i>Clarkson v. Musgrave</i> , (1882), 9 Q. B. D. 386, 51 L. J. Q. B. 525, 81 W. R. 47	241, 262
<i>Clatworthy v. R. & H. Green, Ltd.</i> (1902), 86 L. T. 702, 70 W. R. 619, 66 J. P. 996, 18 F. L. R. 611, 4 W. C. C. 152	109, 644, 663
<i>Claxton v. Mowlem</i> , (1888), 1 T. L. R. 756	175, 233
<i>Claydon v. Delhac</i> , (1848), 12 Q. B. 439	85, 87
<i>Claydon v. Green</i> , (1868), L. R. 3 C. P. 511, 37 L. J. C. P. 226, 18 L. T. 607, 16 W. R. 1346	125
<i>Clogg, Parkinson & Co. v. Carley Gas Co.</i> , [1890] 1 Q. B. 393, 65 J. P. J. Q. B. 339, 44 W. R. 606, 12 T. L. R. 211	25
<i>Clement v. Bell</i> , (1899), 1 F. 924, 36 Sc. L. R. 725	107
<i>Clements v. L. & N. W. Ry. Co.</i> , (1891), 2 Q. B. 182, 63 L. J. Q. B. 837, 70 L. T. 801, 42 W. R. 663, 70 L. T. 806, 38 J. P. 818, 10 T. L. R. 539, 9 R. 611	36, 289
<i>Cleveland v. Spier</i> , (1864), 16 C. B. N. S. 399	46
<i>Cleverley v. Gas Light and Coke Co.</i> , (1907), 21 T. L. R. 91	351
<i>Clothier v. Webster</i> , (1862), 12 C. B. N. S. 790, 31 L. J. C. P. 316, 9 Jur. (N. S.) 241, 6 L. T. 461, 10 W. R. 621	246
<i>Coates v. Parkgate Lion Co. v. Parkgate Iron Co. v. Coates</i>	
<i>Cobbett v. Grey</i> , (1850), 4 Ex. 729, 19 L. J. Ex. 117	5
<i>Cochrane v. Traill</i> (No. 1), (1900), 2 F. 794, 37 Sc. L. R. 662	668
<i>Cochrane v. Traill</i> (No. 2), (1900), 3 F. 27, 38 Sc. L. R. 18; 8 Sc. L. T. 183	622, 666

Table of Cases

xxx

	PAGE
Cochrane v. Traill (No. 3), (1901), 3 F. 1901, 38 Sc. L. R. 848	662, 666
Coe v. Platt, (1851), 6 Ex. 762, (1852), 7 Ex. 460, 928, 21 L. J. Ex. 146; 16 Jur. 174	24, 25
Coggs v. Bernard, (1704), 1 Sm. L. C. (11th ed.) 173, 2 Ld. Raym. 909	81
Colchester (Mayor of) v. Brooke, (1845), 7 Q. B. 311, 1 L. J. Q. B. 178, 10 Jur. 610	89
Coldick v. Partridge, Jones & Co., Ltd., (1908), 18 L. T. 814, 24 T. L. R. 646	35, 372
Coleman v. N-E Ry. Co., (1899), 16 W. C. C. 151, Times, 28th Feb.	643
Coleman's Depositories and Life and Health Assurance Corporation, Ltd., (1907) 2 K. B. 798, 76 L. J. K. B. 865, 97 L. T. 420, 21 T. L. R. 618	588
Collen v. Wright, (1857), 8 E. & R. 647, 27 L. J. Q. B. 215, 4 Jur. (N. S.) 357, 6 W. R. 121	12
Collins v. Middle Level Commissioners, (1869), L. R. 4 C. P. 279, 38 L. J. C. P. 236, 20 L. T. 142, 17 W. R. 929	69
Collis v. Selden, (1868), 1 R. 3 C. P. 495, 37 L. J. C. P. 231, 16 W. R. 1170	293
Collman v. Mills, (1867) 1 Q. B. 796, 66 L. T. Q. B. 170, 75 L. T. 590, 61 J. P. 102, 13 T. L. R. 122, 18 Cox. C. C. 181	155
Colona Bank v. Whimney, (1880), 11 App. Cas. 426, 56 L. J. Ch. 49, 55 L. T. 362, 34 W. R. 705, 3 Morrell, 207, 24 L. R. 747	248
Colonial Securities Trust Co. v. Massey, (1896) 1 Q. B. 38, 65 L. J. Q. B. 100, 73 L. T. 497, 11 W. R. 212, 12 L. R. 57	402
Colville & Sons v. Tighe, (1900), 1 F. 179, 13 Sc. L. R. 129, 11 Sc. L. T. 771	604
Commissioners of Railways v. Leahy, (1904), 21 Commonwealth L. R. (Australia) 54	99
Condliff v. Condliff, (1871), 29 L. T. 811, 23 W. R. 325	108
Condon v. Great Southern & Western Ry. Co. of Ireland, (1865), 16 Ir. C. L. 115	111
Conitron v. Gavin Paul & Sons, Ltd., (1904), 6 F. 29, 11 Sc. L. R. 81, 11 Sc. L. T. 983	411
Conklin v. Thompson, (1859), 29 Barb. (N. Y.) 218	84
Cornolly v. Young's Paraffin Light and Mineral Oil Co., Ltd., (1904), 22 R. 40, 12 Sc. L. R. 61, 2 Sc. L. T. 306	202, 215
Coutrov v. Percok, (1907) 2 Q. B. 6, 66 L. T. Q. B. 127, 76 L. T. 465, 15 W. R. 502, 61 J. P. 110	214, 245
Conway v. Chemenet, (1885), 2 T. L. R. 40	165, 168, 184
Cook v. Johnson, (1885), 55 Am. R. 701	92
Cook v. North Metropolitan Tramways Co., (1887) 18 Q. B. D. 683, 56 L. J. Q. B. 309, 56 L. T. 148, 57 L. T. 176, 35 W. R. 577, 51 J. P. 630, 3 T. L. R. 521	268, 270
Cook v. Stark, (1846), 14 R. 1, 24 Sc. L. R. 5	25, 205
Cooke v. Midland Great Western Ry. Co. of Ireland, (1908), 2 I. R. 242, 41 Ir. L. T. 157	59, 71, 95
Coomber v. Smith, (Justices of), (1882), 9 Q. B. D. 17, 51 L. J. Q. B. 297, 30 W. R. 779, 46 J. P. 621, affirmed, (1883), 9 App. Cas. 61	123
Cooper v. Caledonian Ry. Co., (1902), 4 F. 880, 39 Sc. L. R. 600, 10 Sc. L. T. 104	84
Cooper v. Cooper, (1888), 147 Mass. 870	101

	PAGE
Cooper v F.W. Coal Co., [1907] 8 C 664, 44 Sc. L. R. 462 . . .	470
Cooper v McGowan, (1901), 39 Sc. L. R. 102, 4 F. 249; 9 Sc. L. T. 270 . . .	489
Cooper v Whittingham, (1881), 15 Ch. D. 501, 49 L. J. Ch. 752, 43 L. T. 16, 24 W. R. 720 . . .	654
Cooper v Woolley, (1867), L. R. 2 Ex. 88, 36 L. J. M. C. 27, 15 L. T. 589, 15 W. R. 450 . . .	605
Coppen v Meade, (No. 2), [1898] 2 Q. B. 304, 67 L. J. Q. B. 649, 78 L. T. 520, 16 W. R. 620, 62 J. P. 453, 14 T. L. R. 411, 19 Cox C. C. 45 . . .	155
Corbett v Pender, [1904] 2 K. B. 422, 71 L. J. K. B. 887, 90 L. T. 781, 68 J. P. 187, 20 T. L. 41, 473 . . .	267, 451, 452
Corsan v East Sonney Ironworks Co., (1880), 58 L. J. Q. B. 145, 5 F. L. R. 101 . . .	159, 186
Cordey v Cardiff Pine Ice and Cold Storage Co., Ltd., (1900), 68 L. T. 192, 19 T. L. R. 256 . . .	295
Cork and Youghal Ry. Co., <i>In re</i> , (1869), L. R. 1 Ch. 748, 39 L. J. Ch. 277, 21 L. T. 745, 18 W. R. 26 . . .	97
Corn v Matthews, [1891] 1 Q. B. 310, 62 L. J. M. C. 61, 68 L. T. 480, 11 W. R. 261, 57 J. P. 407, 9 T. L. R. 183, 4 B. 210 . . .	240
Corning v Hinden, (1853), 15 How. (U. S.) 252 . . .	175
Cornish v Accident Insurance Co., Ltd., (1880), 24 Q. B. 153, 58 L. J. Q. B. 301, 38 W. R. 130, 51 J. P. 263, 5 F. L. R. 743 . . .	16
Cornman v Eastern Counties Ry. Co., (1850), 11 L. J. N. 781, 29 L. J. Ex. 81, 31 L. T. (O. S.) 302, 5 Jm. (N. S.) 657 . . .	60, 78, 172
"Corran" The, (1891), 115 L. S. (31 Davis) 335 . . .	119
Cosgrave v Anglo-American Oil Co., Ltd., (1900), 34 L. L. T. 56 . . .	500, 503
Cotton v Wood, (1868), 8 C. B. N. S. 568, 29 L. J. C. P. 343, 7 Jur. (N. S.) 168 . . .	76
Couch v Steel, (1854), 3 B. & B. 402, 23 L. J. Q. B. 121, 18 Jur. 515, 2 W. R. 170 . . .	27, 251
Coughlan v Cambridge City, (1896), 166 Mass. 268 . . .	214
Coughlin v Gillison, [1899] 1 Q. B. 145, 68 L. J. Q. B. 117, 59 L. T. 627, 17 W. R. 114 . . .	91, 184, 188
Coulthard v Consett Iron Co., [1905] 2 K. B. 469, 75 L. J. K. B. 60, 54 W. R. 181, 91 L. T. 756, 22 T. L. R. 25, 8 W. C. C. 95 . . .	165, 168
Cowan v Lombard Deposit Bank, (1876), 1 L. N. D. 104, 45 L. J. Ex. 574, 45 L. T. 184, 25 W. R. 116 . . .	656
Cowler v Moresby Coal Co., (1885), 1 T. L. R. 375, 79 L. T. newsp. 176 . . .	139
Cowley v Mayor of Sunderland, (1861), 6 H. & N. 565, 30 L. J. Ex. 127, 4 L. T. 720, 9 W. R. 618 . . .	180
Cox v G. W. Ry. Co., (1882), 9 Q. B. D. 106, 30 W. R. 816, 47 J. P. 116 . . .	235
Cox v Hamilton Sewer Pipe Co., (1887), 14 Ont. R. 800 . . .	210, 260
Coyle v Great Northern Ry. Co. of Ireland, (1887), 20 L. R. L. 409 . . .	99
Coylton Coal Co. v Davidson, (1907), 7 F. 727, 42 Sc. L. R. 596, 13 Sc. L. T. 99 . . .	506
Coyne v Union Pacific Ry. Co., (1890), 131 L. S. (26 Davis) 170 . . .	218
Crafter v Metropolitan Ry. Co., (1866), 17 R. & L. C. P. 800, 35 L. J. C. P. 132, H. & R. 161, 13 Jur. (N. S.) 272, 14 W. R. 384 . . .	172

• Table of Cases

XXXXII

	PAGE
Cramb v. Caledonian Ry. Co., (1893), 19 R. 1054, 29 Sc. L. R. 605	58
Crawford v. Upper, (1889), 16 Ont. App. 440	73
Cromms v. Guest, Keen & Nottelbfelds, Ltd., (1904), 1 K. B. 159, 77 L. J. K. B. 326, 93 L. T. 115, 21 T. L. R. 189	382
Cubb v. Kynoch, [1907] 2 K. D. 518, 76 L. J. K. B. 918, 97 L. T. 181, 23 T. L. R. 530	41
Cubb v. Kynoch, (No. 2), [1905] 2 K. B. 531, 77 L. J. C. D. 1001	422, 121, 124
Cuchton v. Ken, (1863), 1 Macph. 107, 15 Sc. Jur. 217	30
Cripps v. Judge, (1884), 11 Q. B. D. 581, 53 L. J. Q. B. 517, 51 L. T. 182, 33 W. R. 35, 19 J. P. 100	159, 161
Crisp v. Anderson, (1815), 1 Stark (N. P.) 96, 18 R. R. 714	82
Croaker v. Chicago & N.-W. Ry. Co., (1875), 47 Am. R. 501	146
Crocker v. Banks, (1884), 1 F. L. R. 121	87, 10, 92
Croft v. Abson, (1821) 4 B. & Ald. 590, 21 R. R. 407	149
Cross, Tetley & Co. v. Catbrell (unreported), referred to in Sharp v. Johnson, [1905] 2 K. D. 149, at p. 115	182
Crossan v. Caledon Shipbuilding & Engineering Co., (1905) W. N. 101, 13 Sc. L. R. 852, 11 Sc. L. T. D.	116, 117
Crossfield v. Tuman, [1900] 2 Q. B. 629, 82 L. T. 813, 18 W. R. 609, 16 F. L. R. 176, 2 W. C. C. 111	573, 575
Crumble v. Walls and Local Bd., [1901] 1 Q. B. 501, 60 L. J. Q. B. 312, 61 L. T. 190, 50 J. P. 121, 7 F. L. R. 229	217
Cuff v. Newark & New York Ry. Co., (1872), 6 Vinson (N. Y.) 17	285
Cullen v. Thompson, [1862], 1 Mo. q. (11 L. Sc.) 121, 2 Paterson 1141	13
Cundy v. Le Cocq, (1891), 11 Q. B. D. 267, 60 L. J. M. C. 125, 51 L. T. 265, 32 W. R. 769, 18 J. P. 399	155, 156
Cunningham v. Grand Trunk Ry. Co., (1871), 31 L. pp. Can. C. D. 350	43
Cunningham v. M. G. & Co., (1901), 11 F. 775, 18 Sc. L. R. 571, 9 Sc. L. T. D.	361
Czech v. General Steam Navigation Co., (1867) L. R. 3 C. P. 11, 37 L. J. C. P. 3, 17 L. T. 216, 16 W. R. 130	79
Dailly v. Healdie, (1882), 20 Sc. L. R. 92	184
Dailly v. Watson, (1900), 2 F. 1011, 37 Sc. L. R. 782, 8 Sc. L. T. 73	203
Dalrymple v. Dalrymple, (1841), 2 Hagg. Cons. 51	470
Dalton v. N.-E. Ry. Co., (1859), 4 L. R. N. S. 290, 27 L. J. C. P. 227, 4 Jur. (N. S.) 711, 6 W. R. 571	105, 110, 550
Daniel v. Metropolitan Ry. Co., (1871), L. R. 5 H. L. 15, 40 L. J. C. P. 121, 24 L. T. 815, 20 W. R. 37	80
Daniel v. Ocean Coal Co., Ltd., [1900] 2 Q. B. 250, 69 L. J. Q. B. 567, 82 L. T. 523, 48 W. R. 467, 61 J. P. 136, 16 T. L. R. 366, 2 W. C. C. 135	580, 592
Darlington v. Boscoe, [1907] 1 K. B. 219, 76 L. J. K. B. 371, 96 L. T. 179, 21 T. L. R. 167, 9 W. C. C. 1	101, 475, 580
Davey v. L. & S.-W. Ry. Co., (1883), 12 Q. B. D. 70, 58 L. J. Q. B. 58, 49 L. T. 719, 48 J. P. 369	83, 84
Davidson v. Stuart, (1903), 31 Cou. S. C. R. 215	168

	PAGE
Davidson v. Wright, (1897), 11 Vict. L. R. 351	137
Davidson v. Hill, [1901] 2 K. B. 606, 70 L. J. K. B. 788, 85 L. T. 118, 49 W. R. 630, 17 T. L. R. 614, 9 Asp. M. C. 223	103, 476
Davies v. Bevis, L. (Lord), (1861), 3 M. & E. 549, 30 L. J. M. C. 81, 3 L. T. 697, 9 W. R. 331, 7 Jur. (N. S.) 410	273
Davies v. Mann, (1812), 10 M. & W. 546, 12 L. J. Ex. 10, 6 Jur. 954	88
Davies v. Rhymney Iron Co., Ltd., (1900), 16 T. L. R. 829, 2 W. C. C. 22	391, 198, 507
Davis v. Gallett, (1830), 6 Bing. 716, 4 M. & P. 540, 8 L. J. (C. S.) C. P. 253, 81 R. R. 521	65
Davis v. New York, & Rd. Co. (1894), 159 Mass. 512	206
Davis v. Saunders, (1770), 2 Chitty, (K. B.) 641	16
Davison v. Henderson, (1866), 22 R. 148, 32 N. L. R. 311	77
Davies v. Richardson, (1888), 21 Q. B. D. 202, 57 L. J. Q. B. 109, 59 L. T. 765, 36 W. R. 728	217
De Francesco v. Barnum, (1890), 15 Ch. D. 190, 60 L. J. Ch. 63, 63 L. T. 138, 39 W. R. 5, 6 T. L. R. 401	230
Degg v. Midland Ry. Co., (1857), 1 H. & N. 773, 26 L. J. N. 171, 28 L. T. 357, 5 W. R. 364, 1 Jur. (N. S.) 89	13, 10, 57
Dempster v. Hunter & Sons, (1902), 4 F. 540, 39 Sc. L. R. 395, 9 Sc. L. T. 381	488
Dempster v. Wm. Baird & Co., [1908] S. C. 722, 45 Sc. L. R. 132	694
Devine v. Caledonian Ry. Co., (1899), 1 F. 1105, 36 Sc. L. R. 877, 7 Sc. L. T. 99	389, 502
Devonald v. Rosser & Co., [1903] 2 K. B. 728, 73 L. J. K. B. 683, 93 L. T. 232, 22 T. L. R. 682	11
Devonshire v. Rawlinson, (1861), 28 J. P. 72	277
Dewar v. Taker, (1907), 23 T. L. R. 251	140
Dowdell v. Mather, (1908), 2 K. B. 751, 21 T. L. R. 810	150, 518
Dickinson v. N.-L. Ry. Co., (1861), 2 H. & C. 735, 33 L. J. Ex. 91, 9 L. T. 299, 12 W. R. 52	101
Dickson v. Evans, (1791), 6 T. R. 57, 3 R. R. 119	74
Dimes v. Petley, (1850), 15 Q. B. 276, 19 L. J. Q. B. 119, 14 Jur. 1132	89
Dixon v. Bell, (1816), 6 M. & Sel. 198, 1 Stark. 287, 1 Holt. 233, 17 R. R. 808	59
Dixon v. Micklestone, (1872), L. R. 8 Ch. 165, 42 L. J. Ch. 210, 27 L. T. 804, 21 W. R. 178	49
Dobson v. United Collieries, Ltd., (1903), 8 F. 29, 43 Sc. L. R. 260, 13 Sc. L. T. 611	411
Doe d. Bish v. Keeling, (1819), 1 M. & S. 95, 14 R. R. 405	459
Doel v. Sheppard, (1856), 5 E. & B. 856, 25 L. J. Q. B. 124, 2 Jur. (N. S.) 218, 4 W. R. 232	24
Dolan v. Anderson, (1885), 12 R. 804, 22 Sc. L. R. 529	208
Donnelly v. Spencer & Co., (1898), 1 F. 1109, 36 Sc. L. R. 876	208
Donnelly v. W. Baird & Co., Ltd., [1908] S. C. 536, 45 Sc. L. R. 894	578
Donovan v. Laing Wharton and Down Construction Syndicate, Ltd., [1908] 1 Q. B. 629, 63 L. J. Q. B. 25, 68 L. T. 512, 41 W. R. 455, 57 J. P. 583, 9 T. L. R. 813	44, 110, 142, 473

Table of Cases

XXXV

	PAGE
<i>Dornan v. James Allan & Co.</i> , (1900), 3 F. 112; 38 Sc. L. R. 70, 8 Sc. L. T. 265	557
<i>Dothie v. Robert MacAndrew & Co.</i> , [1904] 1 K. B. 808, 772, J. K. B. 388; 98 L. T. 495, 24 T. L. R. 326	538
<i>Doughty v. Firbank</i> , (1883), 10 Q. B. D. 358, 52 L. J. Q. B. 480, 48 L. T. 530, 18 J. P. 55	234
" <i>Douglas</i> ," <i>The</i> , (1882), 7 P. D. 151, 51 L. J. Adm. 87, 47 L. T. 502, 5 Asp. M. C. 15	69
<i>Douglas v. United Mineral Mining Co., Ltd.</i> , (1900), 2 W. C. C. 15, <i>Times</i> newspaper, 20th Feb.	385, 402
<i>Dowding v. G. W. Ry. Co.</i> (1857) 6 Jur. (N. S.) 1130	256
<i>Dowds v. Benne</i> (1902) 5 F. 268, 10 Sc. L. R. 230, 10 Sc. L. T. 431	578, 625
<i>Dowell v. General Steam Navigation Co.</i> , (1855), 5 F. & B. 195, 26 L. J. Q. B. 50, 1 Jur. (N. S.) 800, 4 W. R. 492	88
<i>Doyle v. Beattie & Sons</i> , (1900), 2 F. 1166, 47 Sc. L. R. 915	529
<i>Drow v. East White</i> , (1881), 26 L. J. Q. B. 107	25
<i>Dublin, Wicklow and Wexford Ry. Co. v. Slattery</i> , (1878), 3 App. Cas. 1155, 39 L. T. 365, 27 W. R. 191	78, 83
<i>Duckworth v. Johnson</i> , (1859), 4 H. & N. 654, 20 L. J. Ex. 25, 5 Jur. (N. S.) 690, 7 W. R. 155	110
<i>Duff v. National Telephone Co.</i> , (1880), 16 B. 675, 26 Sc. L. R. 512, 92, 93 85 L. T. 126, 50 W. R. 76, 17 L. J. R. 55	84
<i>Duncan v. Fulliter</i> , (1880), 6 C. L. P. 891	102
<i>Dunder & Adolphus Joint Ry. Co. v. Carlin</i> (1901) 4 F. 811, 48 Sc. L. R. 635, 9 Sc. L. T. 16	187, 489
<i>Dunham v. Clark</i> , 1902 2 K. B. 292, 71 L. J. K. B. 683, 86 L. T. 751, 50 W. R. 585, 66 J. P. 612, 18 T. L. R. 615, 1 W. C. C. 102, 55, 852	
<i>Dunkley v. Harrison</i> (1887), 56 L. J. 690, 51 F. P. 588	17
<i>Dunlop v. Higgins</i> (1848) 1 H. L. C. 381, 12 Mo. 205	365
<i>Dunlop v. McCreedy</i> , (1900), 2 F. 1027, 47 Sc. L. R. 770, 8 Sc. L. T. 91	443, 447
<i>Dunlop v. Rankin & Blackmore</i> (1901) 1 F. 201, 30 Sc. L. R. 116	664
<i>Dunn v. Macdonald</i> , 1897, 1 Q. B. 555, 66 L. J. Q. B. 420, 76 L. T. 441, 45 W. R. 355, 14 T. L. R. 101, 232	282
<i>Durham v. Brown, Ltd.</i> , (1900), 1 F. 270, 36 Sc. L. R. 190, 6 Sc. L. T. 230	373, 385, 386
<i>Duthie v. Caledonian Ry. Co.</i> , (1898) 23 R. 911, 35 Sc. L. R. 726	255
<i>Dyer v. Minuday</i> , [1895] 1 Q. B. 712, 61 L. J. Q. B. 418, 72 L. T. 448, 18 W. R. 410, 59 J. P. 276, 11 T. L. R. 282, 14 R. 806, 147, 369	
<i>Dynon v. Leach</i> , (1857), 26 L. J. Ex. 221, 29 L. T. (N. S.) 81, 5 W. R. 490	27, 82, 84
<i>Eaglesfield v. Londonderry (Marquess of)</i> , (1876), 4 Ch. D. 698, 88 L. T. 808, 26 W. R. 540	698
<i>East & West India Dock Co. v. Kirk & Randall</i> , (1887), 12 App. Cas. 798, 57 L. J. Q. B. 295, 54 L. T. 168	630
<i>Eckert v. Long Island Railroad Co.</i> , (1871), 48 N. Y. 502	91

	PAGE
Edwards v. Godfrey, [1839] 2 Q. B. 833, 61 L. J. Q. B. 666, 80 L. T. 674, 17 W. R. 551, 15 T. L. R. 355, 1 W. C. C. 32	117, 118, 419, 421, 426
Edwards v. G. W. Ry. Co., (1871), 11 C. B. 588, 21 L. J. C. P. 72	211
Edwards v. Guit, Keen & Nettlefold, Ltd., 1901, 1 K. B. 349, 71 L. J. K. B. 165, 91 L. T. 19, 52 W. R. 456, 68 J. P. 297, 20 T. L. R. 163	683
Edwards v. Hutchison, (1883) 16 R. 691, 25 S. L. R. 550	53
Edwards v. International Coal Co., Ltd., (1899), 5 W. C. C. 21, Times newspaper, 11 Nov.	380
Edwards v. London and Brighton Ry., &c., (1865), 1 F. & P. 530	21
Edwards v. L. & N. W. Ry. Co., (1879), 1 L. R. 5 C. P. 445, 39 L. J. C. P. 241, 22 L. T. 636, 18 W. R. 844	152
Edwards v. Melbourne and Metropolitan Board of Works, (1893), 19 L. R. (1st) 112	81
Edwards v. Midland Ry. Co. (1880), 6 Q. B. D. 257, 50 L. J. Q. B. 241, 13 L. T. 691, 20 W. R. 691, 35 L. J. 374	151
Egerton v. Brownlow (Ltd.), (1853), 1 H. L. C. 1, 23 L. J. Ch. 318, 18 Jur. 71	235
Egerton v. North British Ry. Co., (1870), 5 Macph. 980, 12 Sc. Jur. 375	197
Elder v. Croull, (1849), 11 Dunlop 1010	107
Eller v. G. N. Ry. Co., (1900), 17 T. L. R. 153	118
Elliott v. Lagum, 1902 2 K. B. 81, 71 L. J. K. B. 183, 87 L. J. 29, 50 W. R. 521, 19 T. L. R. 514, 4 W. C. C. 11	511, 577, 688
Elliott v. Tempest, (1888), 5 T. L. R. 34	169
Ellis v. Joseph Ellis & Co., (1905), 1 K. B. 321, 71 L. J. K. B. 223, 92 L. T. 718, 53 W. R. 311, 21 T. L. R. 182, 7 W. C. C. 97	145, 152
Ellis v. Kuott, (1900), 2 W. C. C. 116, Times newspaper, 9th April	566, 571
Ellisbury v. New York, &c., Rd. Co., (1898), 172 Mass. 130	185
Emm v. Nulloth [1903] 2 K. B. 261, 72 L. J. K. B. 620, 89 L. T. 100, 52 W. R. 107, 67 J. P. 351, 13 T. L. R. 530, 20 C. C. C. 207	155
Emmings v. Elderton, (1853), 4 H. L. C. 621, 13 C. B. 195, 18 Jur. 21	10, 415
Engel v. New York, Providence & Boston Rd. Co., (1893) 160 Mass. 260	197
Englehart v. Lantant & Co., (1897), 1 Q. B. 240, 66 L. J. Q. B. 122, 75 L. T. 617, 15 W. R. 179, 13 T. L. R. 81	51, 55, 56, 61, 71
"Englishman," The, and "Anstodia," The, 1895, 1 P. 212, 64 L. J. P. 74, 72 L. T. 203, 43 W. R. 670, 7 A. P. M. C. 605, 11 R. 757	154
Enslin v. Wylie, (1862), 10 H. L. C. 1, 31 L. J. Ch. 102, 8 Jur. (N.S.) 807, 6 L. T. 263, 10 W. R. 467	36, 295
Eureka Co. v. Bass, (1886), 60 Am. R. 152	192
Evans v. Cook, [1905] 1 K. B. 53, 74 L. J. K. B. 195, 93 L. T. 43, 53 W. R. 81, 21 T. L. R. 12	682, 691
Evans v. Liverpool Corporation, [1906] 1 K. B. 160, 74 L. J. K. B. 742, 69 J. P. 263, 2 L. G. R. 868, 21 T. L. R. 558	45
Evans v. Penwyll Dinas Silica Bricks Co., (1901), 18 T. L. R. 58, 4 W. C. C. 101	446, 447
Ewbank v. Nutting, (1849), 7 C. B. 797	142
Eyeten v. Studd, (1874), 2 Plowd. 159, 75 Eng. Rep. 683	266, 443, 449

Table of Cases

xxvii

	PAGE
<i>Fagan v. Mordoch</i> , (1899), 1 F. 1179, 36 Sc. L. R. 921, 7 N. L. T. 113	478, 549
<i>Fagan v. Reed</i> , (1899), Times newspaper, 6th June	418
<i>Falconer v. London & Glasgow Engineering, etc., Co.</i> , (1907), 8 F. 561, 88 Sc. L. R. 381, 8 Sc. L. T. 130	378, 390
<i>Falconer v. McCabe</i> , (1901), 3 F. 210, 34 Sc. L. R. 112, 8 Sc. L. T. 339	269
<i>Farmer v. Grand Trunk Ry. Co.</i> , (1891), 21 Ont. R. 259	116
<i>Fernham v. New Bank Coal Co., Ltd.</i> , (1893), 23 R. 722, 33 Sc. L. R. 555, 1 Sc. L. T. 2	202, 207
<i>Farrant v. Barnes</i> , (1862), 11 C. B. N. S. 553, 31 L. J. C. P. 137, 8 Jur. (N. S.) 864	27
<i>Farwell v. Boston and Worcester Railroad Corpn.</i> , (1842), 45 Mass. 19, 3 Mass. (H. L. Sc.) 316	21, 136
<i>Feltham v. England</i> , (1866), L. R. 2 Q. B. 33, 7 B. & S. 676, 36 L. J. Q. B. 14, 15 W. R. 151	6
<i>Fenn v. Miller</i> , (1900) 1 Q. B. 588, 69 L. J. Q. B. 119, 82 L. T. 244; 18 W. R. 369, 64 J. P. 150, 16 T. L. R. 265, 2 W. C. C. 55	101, 197, 500, 501
<i>Fenton v. J. Thorley & Co.</i> , (1903) A. C. 443, 72 L. J. K. B. 787, 89 L. T. 314, 52 W. R. 81, 19 T. L. R. 684, 5 W. C. C. 150, 121, 146, 347, 318, 353, 354, 355	
<i>Ferguson, Morte</i> , (1871), L. R. 6 Q. B. 240, 10 L. J. Q. B. 105; 24 L. T. 96, 19 W. R. 716, 1 Asp. M. C. 8	452
<i>Ferguson v. Green</i> , (1901) 1 Q. B. 25, 83 L. T. 161, 19 W. R. 105, 64 J. P. 819, 17 T. L. R. 41	404
<i>Ferre v. Cowdenbeath Coal Co., Ltd.</i> , (1897), 21 R. 615, 31 Sc. L. R. 192, 1 Sc. L. T. 35	171
<i>Field v. London</i> , (1902) 1 K. B. 47, 71 L. J. K. B. 120, 85 L. T. 571, 50 W. R. 212, 66 J. P. 291, 14 T. L. R. 65, 4 W. C. C. 20	595, 598, 602, 663, 688
<i>Fielden v. Morley Corporation</i> , (1900) A. C. 111, 69 L. J. Ch. 314, 83 L. T. 29, 18 W. R. 515, 64 J. P. 181, 16 T. L. R. 219	123, 247
<i>Fife Coal Co. v. Cooper</i> , (1907), 41 Sc. L. R. 102, see <i>Cooper v. Fife Coal Co.</i>	
<i>Fife Coal Co. v. Davidson</i> , (1907) 8 C. 90, 11 Sc. L. R. 108	576
<i>Fife Coal Co. v. Lindsay</i> , (1908) 8 C. 431, 11 Sc. L. R. 317	665
<i>Filion v. The Queen</i> , (1894), 4 Ex. C. R. (Can.) 114	132
<i>Findlay v. Angus</i> , (1897), 11 R. 312, 21 Sc. L. R. 237	93
<i>Finlay v. Mac-campbell</i> , (1890), 20 Ont. R. 29	150
<i>Finnie v. Duncan</i> , (1901), 7 F. 254, 42 Sc. L. R. 192, 12 Sc. L. T. 557	684
<i>Finnigan v. Peters</i> , (1861), 23 Dunlop 260, 31 Sc. Jur. 119	25
<i>Fitzgerald, In re</i> , <i>Surman v. Fitzgerald</i> , (1904) 1 Ch. 573, 73 L. J. Ch. 136, 90 L. T. 266, 52 W. R. 132, 20 T. L. R. 732	295
<i>Fitzgerald v. W. G. Clarke & Son</i> , (1908), 2 K. B. 796, 99 L. T. 101	299, 364, 369, 378
<i>Fitzpatrick v. Evans & Co.</i> , (1902) 1 K. B. 505, 71 L. J. K. B. 802, 86 L. T. 141, 50 W. R. 390, 17 T. L. R. 253	276, 289, 399, 447
<i>Fitzpatrick v. Hindley Field Colliery Co., Ltd.</i> , (1901), 110 Law Times newspaper, 518, 3 W. C. C. 87, 4 W. C. C. 8	384
<i>Fletcher v. L. & N. W. Ry.</i> , (1892) 1 Q. B. 122, 61 L. J. Q. B. 24; 65 L. T. 605, 40 W. R. 182, 8 T. L. R. 77	18

B.E.L.

<i>Fletcher v. Rylands</i> , (1866), L. R. 1 Ex. 265; affirmed <i>sub nom.</i> <i>Rylands v. Fletcher</i> , (1869), L. R. 3 H. L. 390; 97 L. J. Ex. 161, 19 L. T. 220	76
<i>Flinn v. Perkins</i> , (1862), 32 L. J. Q. B. 10, 7 L. T. 364, 11 W. R. 95; 8 Jur. (N. S.) 1177	101
<i>Flower v. Adam</i> , (1810), 2 Tampt. 314, 11 R. R. 531	68
<i>Flower v. L. & N.-W. Ry. Co.</i> , [1894] 2 Q. B. 65, 63 L. J. Q. B. 547, 70 L. T. 829, 42 W. R. 519, 10 T. L. R. 127, 9 R. 494	86, 280
<i>Flower v. Low Leyton Local Bd.</i> , (1877), 5 Ch. D. 347, 46 L. T. Ch. 621, 36 L. T. 760, 25 W. R. 545	246
<i>Forbes v. Aberdeen Harbour Commissioners</i> , (1888), 15 R. 323, 25 Sc. L. R. 249	39
<i>Ford v. G. W. Ry. Co.</i> , [1905] 2 K. B. 532, 71 L. J. K. B. 871, 91 L. T. 811, 53 W. R. 571, 21 T. L. R. 625	395
<i>Foreman v. Canterbury (Mayor of)</i> , (1871), L. R. (1) B. 211, 40 L. J. Q. B. 138, 24 L. T. 885, 19 W. R. 719	288
<i>Forgan v. Buike</i> , (1861), 12 L. C. L. R. 197	268
<i>Forman v. Dawes</i> , (1841), Car. & M. 127	280
<i>Forrester v. McCallum</i> , (1901), 8 F. 650, 38 Sc. L. R. 148, 8 Sc. L. T. 486	520
<i>Forsyth v. Ramage</i> , (1890), 18 R. 21, 24 Sc. L. R. 26	166, 172
<i>Foulkes v. Metropolitan District Ry.</i> , (1880), 5 C. P. D. 167, 49 L. J. C. P. 361, 42 L. T. 315, 28 W. R. 526	15
<i>Fowler v. Lock</i> , (1872), L. R. 7 C. P. 272, (1871), L. R. 10 C. P. 90, 31 L. T. 884, 21 W. R. 415	32
<i>Fox v. Veale</i> , (1841), 8 M. & W. 126, 10 L. J. N. 274, 9 Dowd. 588, 5 Jur. 315	257
" <i>Francina</i> ," <i>The</i> , (1877), 2 P. D. 163, 36 L. T. 640, 25 W. R. (77), 8 App. V. C. 135, <i>sub nom.</i> <i>Jeffrey v. "Francina"</i> (Owners of), 46 L. J. P. 83	104
" <i>Frankland</i> ," <i>The</i> , [1901] P. 161, 70 L. J. P. 12, 81 L. T. 795, 17 T. L. R. 419, 9 App. M. C. 196	151
<i>Franklin v. S. E. Ry. Co.</i> , (1858), 3 H. & N. 211, 6 W. R. 573, 1 Jur. (N. S.) 565	110
<i>Fraser v. Fraser</i> , (1882), 9 R. 896, 19 Sc. L. R. 616	179
<i>Fraser v. G. N. of Scotland Ry. Co.</i> , (1901), 8 F. 688, 38 Sc. L. R. 658, 110, 367, 612, 618	10, 169, 181
<i>Fraser v. Hood</i> , (1887), 15 R. 178, 25 Sc. L. R. 164	97
<i>Fraser v. Edinburgh Tramway Co.</i> , (1882), 10 R. 264, 20 Sc. L. R. 192, 599, 7 Sc. L. T. 459	146, 573
<i>Freemantle v. L. & N.-W. Ry. Co.</i> , (1860), 2 L. & P. 387, (1861), 10 C. B. N. S. 80, 31 L. J. C. P. 12, 9 W. R. 611	60
<i>French v. Underwood</i> , (1903), 19 T. L. R. 416, 5 W. C. C. 119	471, 549
<i>Fritz v. Hobson</i> , (1880), 14 Ch. D. 542, 49 L. J. Ch. 321, 42 L. T. 225, 677, 28 W. R. 459, 722	638
<i>Fry v. Balmann Steam Ferry Co.</i> , (1886), 7 N. S. W. R. (Law) 146, 267, 269, 278, 279	267, 269, 278, 279
<i>Fuller v. I. A. v. Squire</i> , [1901] 2 K. B. 209, 70 L. J. K. B. 689; 85 L. T. 249, 49 W. R. 689; 65 J. P. 630	461
<i>Fullerton, Hodgart & Barclay v. Logue</i> , (1901), 38 Sc. L. R. 748, <i>see</i> <i>Logue v. Fullerton, Hodgart & Barclay</i> .	

Table of Cases

xxix

	PAGE
<i>Gardner v. Groves</i> , (1858), 1 F. & F. 359 ..	52
<i>Garland v. City of Toronto</i> , (1896), 23 Ont. A. R. 238 ..	219
<i>Gas Float Whittou (No. 2)</i> ; see <i>Wells v. Owners of Gas Float Whittou</i>	•
<i>Gautrot v. Egerton</i> , (1867), L. R. 2 C. P. 371, 36 L. J. C. P. 191; 16 L. T. 17, 15 W. R. 638 ..	57, 298
<i>Geary v. Dixon</i> , (1899), 36 Sc. L. R. 610 ..	569, 570
<i>Geor. Metropolitan Ry. Co.</i> , (1878), L. R. 8 Q. B. 161, 42 L. J. Q. B. 105, 28 L. T. 282, 21 W. R. 584 ..	79
<i>General Steam Navigation Co. v. British and Colonial Steam Navigation Co., Ltd.</i> , (1869), L. R. 4 Ex. 298, 38 L. J. Ex. 97, 20 L. T. 581; 17 W. R. 711 ..	14
<i>George v. Glasgow Coal Co., Ltd.</i> , (1908), S. C. 816, 45 Sc. L. R. 696, 41 H. L. 27, L. R. 37 ..	411
<i>George v. Glasgow Coal Co., Ltd.</i> , (1908), 25 T. L. R. 57 (H. L.) ..	410, 412
" <i>George and Richard</i> ," <i>The</i> , (1871), L. R. 3 A. & E. 466, 24 L. T. 717, 20 W. R. 245 ..	104
<i>George Whitechurch, Ltd. v. Cavanagh, s.e. Whitechurch (George) v. Cavanagh</i>	
<i>Gerard (Lord) v. Kent County Council</i> , (1897), 1 Q. B. 371, affirmed <i>sub nom. Kent C. C. v. Gerard (Lord)</i> , (1897), A. C. 613, 66 L. J. Q. B. 677, 77 L. T. 109, 46 W. R. 111, 61 J. P. 804, 13 F. L. R. 546 ..	64
<i>Gibbs v. G. W. Ry. Co.</i> , (1881), 12 Q. B. 208, 51 L. J. Q. B. 543; 50 L. T. 7, 32 W. R. 720, 18 F. P. 230 ..	237, 298
<i>Gibson v. Nunnino</i> , (1895), 22 R. 191, 12 Sc. L. R. 411, 2 Sc. L. T. 563 ..	89
<i>Gibson v. Wilson</i> , (1901), 1 F. 601, 38 Sc. L. R. 450, 8 Sc. L. T. 497 ..	384
<i>Gibson v. Womald & Walker, Ltd.</i> , (1901), 2 K. B. 10, 73 L. J. K. B. 191, 91 L. T. 7, 52 W. R. 661, 68 J. P. 382, 20 T. L. R. 452, 6 W. C. C. 155 ..	689, 672
<i>Gilbertson v. Richardson</i> , (1848), 5 C. B. 502, 17 L. J. C. P. 112, 12 Jur. 292 ..	68
<i>Giles v. Bedford, Smith & Co.</i> , (1903), 1 K. B. 813, 73 L. J. K. B. 569, 86 L. T. 734, 51 W. R. 692, 67 J. P. 820, 19 T. L. R. 422, 5 W. C. C. 143 ..	456, 529
<i>Giles v. Thames Ironworks and Shipbuilding Co.</i> (1885), 1 T. L. R. 469 ..	185
<i>Gill v. Aberdeen Steam Trawling and Fishing Co., Ltd.</i> , (1908), S. C. 328, 45 Sc. L. R. 217 ..	453
<i>Gill v. Thorneycroft</i> , (1891), 10 T. L. R. 316 ..	175, 177
<i>Gillard v. Lancashire & Yorkshire Ry. Co.</i> , (1848), 12 L. T. (O. S.) 856 ..	109
<i>Gillespie v. Hunter</i> , (1898), 25 R. 916, 25 Sc. L. R. 711 ..	151
<i>Gillett v. Faulkner</i> , (1846), 3 T. L. R. 618 ..	266, 281, 477
<i>Gilshannon v. Stony-Brook Railway Corporation</i> , (1852), 64 Blane. 228 ..	372
<i>Glasgow & S. W. Ry. Co. v. Laidlaw</i> , (1900), 2 F. 708, 37 Sc. L. R. 508 ..	409, 641
<i>Glasgow Coal Co. v. Sneddon</i> , (1905), 7 F. 485, 42 Sc. L. R. 365; 12 Sc. L. T. 717 ..	405, 412
<i>Glenister v. G. W. Ry. Co.</i> , (1878), 29 L. T. 423 ..	395
<i>Glover v. L. & S. W. Ry. Co.</i> , (1867), L. R. 8 Q. B. 25, 37 L. J. Q. B. 57, 17 L. T. 189 ..	68

	PAGE
<i>Godfrey v. Dalton</i> , (1880), 6 Bing. 460; 4 M. & P. 149; 8 L. J. (O. S.) C. P. 79, 31 R. R. 457	68
<i>Goff v. G. N. Ry. Co.</i> , (1861), 3 B. & E. 672, 30 L. J. Q. B. 148; 3 L. T. 850, 7 Jur. (N. S.) 286	142, 151
<i>Golder v. Caledonian Ry. Co.</i> , (1902), 5 F. 123, 40 Sc. L. R. 89, 10 Sc. L. T. 373	350
<i>Golding v. Caudwell</i> , (1851), 2 L. M. & P. 175	257
<i>Goldstone v. (Hiffard)</i> , (1889), Times, 19th Jan.	59
<i>Goodes v. Cluff</i> , (1884), 13 Q. B. D. 694	666
<i>Goodlet v. Caledonian Ry. Co.</i> , (1902) 4 F. 486, 39 Sc. L. R. 765, 10 Sc. L. T. 203	374
<i>Gordon, Ex parte</i> , (1855), 25 L. J. M. C. 12, 25 L. T. (O. S.) 147, 3 W. R. 564, 1 Jur. (N. S.) 683	275
<i>Gordon v. Jennings</i> , (1842), Q. B. D. 45, 51 L. J. Q. B. 417, 46 L. T. 534; 30 W. R. 701, 46 J. P. 519	266, 443
<i>Gorley v. Buckworth Collieries</i> , (1905), 93 L. T. 360, 21 T. L. R. 494, 7 W. C. C. 19	349
<i>Gosau v. James Gillies & Co.</i> , [1907] 8 C. 64, 43 Sc. L. R. 71	346
<i>Goudie v. Paul</i> , (1894), 22 R. L. 32 Sc. L. R. 3, 2 Sc. L. T. 254	255
<i>Gough v. Crawshaw Brothers</i> , [1908] 1 K. B. 448, 77 L. J. K. B. 236, 98 L. T. 827, 24 T. L. R. 186	542
<i>Gourlay v. Murray</i> , [1908] 8 C. 769, 45 Sc. L. R. 577, 49, 550, 569	
<i>Gourlay Bros. & Co. v. Fenner</i> , (1902), 4 P. 711, 79 Sc. L. R. 453	646
<i>Gow v. Honey</i> , (1899), 2 F. 48, 37 Sc. L. R. 40	108
<i>Gracey v. Bellfast Tramway Co.</i> , [1901] 21 R. 322	146, 149
<i>Graham v. Ingledy</i> , (1848), 1 Ex. 661, 5 Dowl. & L. 737	429
<i>Graham v. Public Works Commissioners</i> , [1901] 2 K. B. 781, 73 L. J. K. B. 860, 85 L. T. 96, 50 W. R. 122, 65 J. P. 677, 17 T. L. R. 510	242
<i>Graham v. Thomson</i> , (1922), 1 Shaw 309	267
<i>Graig Brick Co. v. Williams</i> , (1901), 13 Nov., Parsons & Beattie W. L. Acts, 3rd ed. 124	574
<i>Grainger v. Ainsley</i> , (1840), 6 Q. B. D. 182, 50 L. J. M. C. 48, 14 L. T. 608, 29 W. R. 212, 15 J. P. 142	141, 277, 289
<i>Grand Trunk Ry. Co. of Canada v. Jennings</i> , (1884), 13 App. Cas. 800, 58 L. J. P. C. 1, 59 L. T. 679, 37 W. R. 403, 17 L. R. 752	115
<i>Grand Trunk Ry. Co. of Canada v. Weegar</i> , (1894), 23 Can. S. C. 422	210
<i>Graft v. Caledonian Ry. Co.</i> , (1870), 9 Macph. 254, 8 Sc. L. R. 192	93
<i>Grant v. Glasgow & S.-W. Ry. Co.</i> , [1908] 8 C. 147, 45 Sc. L. R. 124	370
<i>Gray v. Haig</i> , (1855), 20 Beav. 219	81
<i>Gray v. Thomson</i> , (1889), 17 R. 200; 27 Sc. L. R. 113	166
<i>Great Eastern Ry. Co. v. Goldsmith</i> , (1884), 9 App. Cas. 927; 54 L. J. Ch. 162, 52 L. T. 270, 83 W. R. 81, 49 J. P. 260	205
<i>Great Fingal Consolidated v. Sheehan</i> , (1905), 8 C. L. R. (Australia) 176	557
<i>Great North of Scotland Ry. Co. v. Fraser</i> , (1901), 38 Sc. L. R. 658; see <i>Fraser v. G. N. of Scotland Railway</i> .	
<i>Great Northern Ry. Co. v. Dawson</i> , [1905] 1 K. B. 831, 74 L. J. K. B. 271; 92 L. T. 145; 53 W. R. 309, 21 T. L. R. 193, 7 W. C. C. 114	538
<i>Great Northern Ry. Co. v. Whitehead & Co.</i> , (1902), 18 T. L. R. 816	690, 694

Table of Cases

xli

	PAGE
Great Western Railway Co v Blower, <i>see</i> Blower v G W Ry Co	
Green v. Thompson, [1839] 2 Q B 1, 68 L. J. Q B. 419, 80 L. T. 691, 49 W. R. 31, 63 J. P. 486	289
Greenhill v. Calodoman Ry Co., (1900), 2 F. 736, 37 Sc. L. R. 524; 7 Sc. L. T. 138	487
Greenland v. Chaplain, (1850), 5 Ex. 213, 19 L. J. 18, 203	67, 87
Greenwell v. Howell, [1900] 1 Q B 535, 69 L. J. Q B. 161, 83 L. T. 183, 14 W. R. 307, 16 T. L. R. 215	246
Greenwood v. Greenwood, (1907), 21 L. T. R. 24	10, 165, 424
Greenwood v. Hawkins, (1906) 23 T. L. R. 72	682
Greenwood v. Seymour, <i>see</i> Seymour v. Greenwood	
Gregoir v. Piper, (1839), 9 B & C 591, 4 M & Ry 500	50, 145, 116, 148
Grendon v. Lincoln, (Bishop), (1555), Plow 193, 75 Eng. Rep. 734	87
Greene v. The Queen, (1899), 6 Ex. C. R. (Canada), 276	132
Griffiths v. Davis & Sons, Ltd., (1899), Times newspaper, 18th Nov.	470
Griffiths v. Dudley (Earl), (1882), 9 Q B 10 357, 51 L. J. Q B. 513, 17 L. T. 10, 80 W. R. 797, 46 J. P. 711	36, 37, 241, 294
Griffiths v. Gidlow, (1859), 3 H & N 614, 27 L. J. Ex. 404	28
Griffiths v. London and St. Katherine Docks Co., (1884), 13 Q B D. 259, 51 L. J. Q B 501, 51 L. T. 533, 33 W. R. 35, 49 J. P. 100	27, 37, 169, 194, 208
Grind v. General Iron Screw Collier Co., (1846), 1 L. R. 1 C. P. 600, 35 L. J. C. P. 321, 12 Jur. (N. S.) 727, 11 L. T. 711, 11 W. R. 883	16
Grizzle v. Frost, (1863), 3 P. & F. 622	40, 92
Groves v. Fuller, (1888), 1 T. L. R. 171	6
Groves v. Wimbome (Lord), (1808) 2 Q B 402, 65 L. J. Q B 862, 79 L. T. 284, 17 W. R. 87, 11 T. L. R. 193	25, 62, 251
Guthrie v. House Spinning Co., (1901), 3 F. 769, 38 Sc. L. R. 183	986, 407
Gwilliam v. Twist, [1895] 2 Q B 81, 61 L. J. Q B 471, 72 L. T. 579, 13 W. R. 566, 59 J. P. 481, 11 T. L. R. 115, 14 R. 105	50, 56
Haddock v. Fisher & Sons, (1900), 2 W. C. C. 13, Times newspaper, 7th May	673, 674
Haddock v. Humphreys, (1893), 1 W. C. C. 117, Times, 1st Aug.	649
Halbot v. Lens, [1901] 1 Ch. 811, 70 L. J. Ch. 135, 83 L. T. 702; 49 W. R. 211	12
Halley v. United Collieries, [1907] 8 C. 217; 11 Sc. L. R. 193	383
Hall, <i>In re</i> , The Official Receiver, <i>Ex parte</i> , [1907] 1 K B 875, 76 L. J. K B 546, 97 L. T. 33, 23 T. L. R. 327, 14 Manson, 82	584
Hall v. Johnson, (1865), 8 H & L 599; 84 L. J. Ex. 222, 11 L. T. 779, 13 W. R. 411, 11 Jur. (N. S.) 180	22
Hall v. Leach, [1904] 2 K B 602; 73 L. J. K. B. 819; 91 L. T. 20; 53 W. R. 17, 20 T. L. R. 678	45
Hall v. N. E. Ry Co., (1885), 1 T. L. R. 359	200, 206
Hall v. Snowdon, Hubbard & Co. (No. 1), [1899] 1 Q B. 593; 68 L. J. Q B 863, 80 E. T. 256, 47 W. R. 322; 15 T. L. R. 241, 1 W. C. C. 114	647, 648

	PAGE
<i>Hambro v. Burnand</i> , [1903] 2 K. B. 899, [1904] 2 K. B. 10; 73 L. J. K. B. 66W 90 L. T. 808, 52 W. R. 581, 9 Com. Cas. 251; 20 T. L. R. 398	114
<i>Hamilton v. Grochbeck</i> , (1889), 19 Ont. R. 76, (1891), 18 Ont. N. R. 437	168, 176
<i>Hamilton Bridge Co. v. O'Connor</i> , (1895) 24 Can. S. C. R. 598	159
<i>Hamlyn v. Crown Accidental Insurance Co.</i> , [1893] 1 Q. B. 750, 62 L. J. Q. B. 409, 68 L. T. 701, 41 W. R. 631, 37 J. P. 663, 9 T. L. R. 127, 4 R. 407	17
<i>Hanly v. John Hanlon & Co.</i> , [1903] 1 K. B. 81, 72 L. J. K. B. 72; 87 L. T. 500, 51 W. R. 93, 19 T. L. R. 66	1, 117
<i>Hammeck v. White</i> (1862), 11 C. B. N. S. 584, 81 L. J. C. P. 130, 5 L. T. 676, 10 W. R. 230, 8 Jur. (N. S.) 736	51, 73, 75
<i>Hammermith Vichy v. Lowenthal</i> , [1906] 2 Q. B. 278, 65 L. J. Q. B. 662, 73 L. T. 182, 15 W. R. 60, 60 J. P. 600, 12 T. L. R. 459	121
<i>Hammond v. Bussey</i> , (1887), 20 Q. B. 1179, 57 L. J. Q. B. 58, 1 T. L. R. 95	697
<i>Handford v. George Clarke</i> , [1907] 1 K. B. 181, 76 L. J. K. B. 76, 96 L. T. 175, 23 T. L. R. 127, 9 W. C. C. 136	619
<i>Hanlin v. Melrose</i> , (1899), 1 F. 1012, 36 Sc. L. R. 811	170
<i>Hannan, Ex parte</i> , (1897), 18 N. S. W. L. J. (L.) 122	245
<i>Hannan v. Hudson</i> , 7 W. N. (N. S. W.) 105	207
<i>Hanrahan v. Ardmore Steamship Co.</i> , (1887), 22 L. R. 1155	26, 179
<i>Hanson v. Australasian Steam Navigation Co.</i> , [1884], 5 N. S. W. R. (Law) 407	279
<i>Hanson v. Lancashire & Yorkshire Ry. Co.</i> , (1872), 20 W. R. 297	60, 178
<i>Hanson v. Waller</i> , [1901] 1 K. B. 890, 70 L. J. K. B. 231, 84 L. T. 91, 49 W. R. 145, 17 T. L. R. 162	152, 153
<i>Hardaker v. Idle District Council</i> , [1906] 1 Q. B. 345, 65 L. J. Q. B. 368, 74 L. T. 60, 41 W. R. 828, 60 J. P. 196, 12 T. L. R. 307	61, 62, 66
<i>Hardcastle v. Brelby</i> , [1892] 1 Q. B. 709, 61 L. J. M. C. 101, 66 L. T. 843, 56 J. P. 549	155
<i>Hardy v. Ryle</i> , (1829), 9 H. & C. 601, 7 L. J. (O. S.) M. C. 118 4 M. & R. 295	276
" <i>Harrisburg</i> ," <i>The</i> , (1886), 119 U. S. (12 Davis) 199	102
<i>Harris v. Tinn</i> , (1889), 5 T. L. R. 221	76, 186, 198
<i>Harrison v. G. N. Ry. Co.</i> , (1864), 8 H. & C. 261, 33 L. J. M. C. 206, 10 Jur. (N. S.) 992, 10 L. T. 621, 12 W. R. 1081	65, 69
<i>Harrison v. Whitaker Bros. Ltd.</i> , [1900], 61 J. P. 54, 16 T. L. R. 108, 2 W. C. C. 12	374, 390
<i>Harold v. Watney</i> , [1898] 2 Q. B. 820, 67 L. J. Q. B. 771, 78 L. T. 788, 46 W. R. 649, 14 T. L. R. 486	41, 71, 93, 94
<i>Harrop v. Oswest Corporation</i> , [1908] 1 Ch. 52, 67 L. J. Ch. 147; 73 L. T. 187, 46 W. R. 391, 62 J. P. 297, 14 T. L. R. 308	246
<i>Hart v. Lancashire & Yorkshire Ry. Co.</i> , (1869), 21 L. T. 261	19, 60
<i>Hartley v. Rochdale Corporation</i> , [1908] 2 K. B. 594, 77 L. J. K. B. 884, 72 J. P. 844, 24 T. L. R. 625, 6 L. G. R. 858	54, 64
<i>Harvey v. Dunlop</i> , (1843), Lator, Supplement to Hill & Denny, 198	52
<i>Harwood and Abraham, In re</i> , [1901] 2 K. B. 364, 70 L. J. K. B. 746, 84 L. T. 857	648

Table of Cases

xh11

	PAGE
F	
<i>Fasker v Wood</i> , (1885), 54 L. J. Q. B. 419; 33 W. R. 697 ...	247
<i>Fenton v Edinburgh, &c, Tramways Co</i> , (1887), 14 R. 61; 21 Sc. L. R. 435	183
<i>Hatchard v Mogg</i> , (1887), 18 Q. B. D. 751, 56 L. J. Q. B. 397, 56 L. T. 662, 35 W. R. 576, 51 J. P. 277, 3 T. L. R. 846	115
<i>Hathaway v Argus Printing Co, Ltd</i> , [1901], 14 Q. B. 96, 70 L. J. K. B. 12, 81 L. T. 165, 49 W. R. 113, 64 J. P. 804, 17 T. L. R. 12, 3 W. C. C. 175	450, 527, 529
<i>Haughton v. North British Ry Co</i> , (1892), 20 R. 113, 30 Sc. L. R. 111	97
<i>Haworth v Andrew Knowles & Son, Ltd, Accident Society</i> , (1903), 19 T. L. R. 658	430
<i>Hawtayne v Bourne</i> , (1841), 7 M. & W. 505, 10 L. J. Ex. 221, 5 Jur. 118	50, 67
<i>Hayden v. Buck</i> , (1902), 5 F. 150; 10 Sc. L. R. 95, 10 Sc. L. T. 380	447
<i>Havlett v. Vigor & Co</i> , [1908] 2 K. B. 847, 21 T. L. R. 845	366
<i>Headford v. W. J. J. Manufacturing Co</i> , (1891), 21 Q. B. 164	172
<i>Heman v. Phillips</i> , (1886), 1 T. L. R. 475	260
<i>Heaven v. Pender</i> (1883), 11 Q. B. D. 501, 52 L. J. Q. B. 502, 49 L. T. 357, 17 J. P. 769	53, 54, 58
<i>Heckscher v. Croslev</i> , (1891), 1 Q. B. 221, 60 L. J. Q. B. 75, 39 W. R. 211	618
<i>Hedley v. Pinkney & Sons' Steamship Co</i> , [1894], A. C. 222, 61 L. J. Q. B. 419, 70 L. T. 630, 42 W. R. 497, 10 T. L. R. 817, 5 Asp. M. C. 143, 6 R. 106	14
<i>Henderson v. Caron Co</i> , (1889), 16 R. 631, 26 Sc. L. R. 456	29
<i>Hendry v. Caledonian Ry Co</i> , 1907 S. C. 712, 11 Sc. L. R. 581	374
<i>Hennessy v. McCabe</i> (1880) 1 Q. B. 191, 69 L. J. Q. B. 173, 81 L. T. 575, 38 W. R. 231, 61 J. P. 3, 16 T. L. R. 57	355
<i>Heron v. Charnley</i> , (1900) 2 W. C. C. 21, Times newspaper, 19th February	486
<i>Heske v. Samuelson</i> (1883) 12 Q. B. D. 30, 51 L. J. Q. B. 45, 49 L. T. 451	263, 164
<i>Hetherington v. Kemp</i> , [1845], 1 Comp. 141, 16 R. R. 573	284
<i>Hetherington v. North-Eastern Ry Co</i> , (1882), 9 Q. B. D. 160, 51 L. J. Q. B. 195, 30 W. R. 597	111, 112
<i>Hewlett v. Allen</i> , (1892), 2 Q. B. 662, affirmed 1894, A. C. 843, 68 L. J. Q. B. 608, 6 R. 155, 51 L. T. 91, 12 W. R. 650, 58 J. P. 500, 10 T. L. R. 161	294
<i>Hewlett v. Hepburn</i> , (1899), 16 T. L. R. 56, 2 W. C. C. 123	525
<i>Hibbs v. Ross</i> , (1866), 1 L. R. 1 Q. B. 511, 9 B. & S. 655, 35 L. J. Q. B. 191, 15 L. T. 67, 11 W. R. 911, 12 Jur. (N. S.) 812	144
<i>Hick v. Raymond & Reid</i> , [1893], A. C. 22, 62 L. J. Q. B. 48, 68 L. T. 175, 41 W. R. 385, 7 Asp. M. C. 281	191
<i>Hicks v. Newport Aberavenny & Hereford Ry Co</i> , (1857), 4 B. & S. 403 n.	114
<i>Hido v. Proprietors of Trent Navigation</i> , (1793), 1 K. P. (N. P.) 86...	15
<i>Higgs v. Maynard</i> , (1866), 1 H. & R. 581, 14 L. T. 332, 14 W. R. 610, 12 Jur. (N. S.) 705	77
<i>Higgins v. Butcher</i> , (1906), Yelv. 69, Noy 18; 80 Eng. Rep. 61	102
<i>Hildeheimer v. W. & F. Paulkner, Ltd</i> , [1901] 2 Ch. 552, 70 L. J. Ch. 800, 85 L. T. 332, 49 W. R. 708, 17 T. L. R. 787...	548

Hill v Bagg, [1909] 2 K B 803; 99 L. T. 104; 24 T. L. R. 711	157, 458, 459, 544
Hill v New River Co., (1868), 9 B & S 303, 18 L. T. 355	68
Hindle v Birtwistle, [1897] 1 Q B 192, 66 L. J. Q B 173; 76 L. T. 159, 13 W. R. 207, 61 J. P. 70, 13 T. L. R. 129, 14 Cox C. C. 508	161
Hirschfield v London, Brighton & South Coast Ry. Co., (1876), 2 Q B D 1, 46 L. J. Q B 91, 85 L. T. 473	118
Hoare v Robert Green, Ltd., [1907] 2 K B 315, 76 L. J. K B 730; 96 L. T. 724, 71 J. P. 341, 23 T. L. R. 483	272, 461
Hobbs v Bradley, (1900), 2 F. 714, 37 Sct. R. 532	641, 702
Hoddinott v Newton, Chambers' Co., Ltd., [1901] A. C. 49; 70 J. J. K. B. 150, 81 L. T. 1, 19 W. R. 380, 17 T. L. R. 181	101, 610
Hoey v Dublin & Belfast Junction Ry. Co., (1870), 5 Ir R C L. 206, 18 W. R. 920	24, 32
Holderan v Bagnell, (1879), 4 L. R. Ir. 710	108
Holleran v Bagnell, (1880), 6 L. R. Ir. 33	108, 110
Holliday v National Telephone Co., [1899] 2 Q B 393, 68 L. J. Q B. 1016, 81 L. T. 252, 17 W. R. 658, 15 T. L. R. 43	61, 287
Holmes v Chailc, (1861), 6 H & N 419, 30 L. J. Ex 135, 7 Jur (N. S.) 397, 3 L. T. 675, 9 W. R. 419, affirmed <i>sub nom</i> Clarke v Holmes, <i>q. v.</i>	21, 25, 31
Holmes v G. N. Ry. Co., [1900] 2 Q B 399, 69 L. J. Q B 854, 83 L. T. 44, 14 W. R. 651, 64 J. P. 532, 16 T. L. R. 112, 2 W. C. C. 19	341, 498
Holmes v North-Eastern Ry. Co., (1869), L. R. 1 Ex 251, L. R. 6 Ex 123, 40 L. J. Ex 121, 21 L. T. 69	17, 293
Holmes v Worthington, (1861), 2 F. & F. 533	30, 192, 229
Holmes v Mackay, (1898), 106 L. T. newspaper, 118, [1899] 2 Q B 319, 68 L. J. Q B 724, 80 L. T. 811, 17 W. R. 531, 15 T. L. R. 351, 1 W. C. C. 11	372, 340, 381, 498
Hooper v Holmes, (1896), 13 T. L. R. 6	210, 241
Korne v Widdlake, (1900), Xchs. 141, 80 Long Rep. 95	37
Hornsey Local Board v Monarch Investment Building Society, (1899), 21 Q. B. D. 1, 59 L. J. Q B 105, 61 L. T. 867, 38 W. R. 85, 5 T. L. R. 30	317, 397
Horsburgh v Sheach, (1900), 11 F. 268, 38 S. L. R. 197	71, 91
Horwell v London General Omnibus Co., (1877), 2 Ex D 365, 16 L. J. Ex. 700, 36 L. T. 637, 25 W. R. 610	65
Houghton v Sutton Heath Collieries, [1901] 1 K B 93; 70 L. J. K. B. 61, 81 L. T. 472, 49 W. R. 196, 65 J. P. 134, 17 T. L. R. 54, 3 W. C. C. 173	531, 532, 534
Houldsworth v City of Glasgow Bank, (1880), 5 App. Cas. 317, 42 L. T. 191, 29 W. R. 572	143
Howard v Bennett, (1888), 58 L. J. Q B 129, 60 L. T. 152, 53 J. P. 359, 5 T. L. R. 136	216, 217
Howarth v Bicarloy, (1887), 19 Q B D 808; 56 L. J. Q B. 543; 56 L. T. 743; 56 W. R. 302; 51 J. E. 440, 8 T. L. R. 640	678
Howe v Finch, (1885), 17 Q B D. 187, 54 W. R. 593, 51 J. P. 276	168, 197, 188
Howells v Landolt Siemens Steel Co., (1875), L. R. 10 Q B 62, 44 L. J. Q. B. 25, 32 L. T. 19, 23 W. R. 385	4, 14, 418

Table of Cases

xii

	PAGE
Howells v. Vivian, (1901), 85 L. T. 529; 53 W. R. 163; 18 T. B. R. 86; 4 W. C. C. 106	471, 549
Howson v. Barrott, (1889), 4 T. L. R. 449	161, 177
Hubball v. Everett & Sons, Ltd., (1900), 16 T. L. R. 168, 5 W. C. C. 145	648
Hughes, <i>Ex parte</i> , (1851), 2 C. L. R. 1512, 23 L. J. M ^c C. 138, 18 Jur. 447, 2 W. R. 465	278
Hughes v. Blunt, (1841), 5 W. N., N. & W. 17	260
Hughes, and Abbott v. Macfie, (1863), 2 H. & C. 744, 33 L. J. Ex. 177, 10 Jur. (N. S.) 682, 12 W. R. 815	93
Hughes v. Malden, etc., Gas Light Co., (1897), 168 Mass. 395	187
Hughes v. Percival, (1893), 8 App. Cas. 411, 52 L. J. Q. B. 719, 14 L. T. 189, 31 W. R. 725, 47 J. P. 772	13
Hull v. Great Northern Ry. Co. of Ireland, (1890), 26 L. R. Ir. 289, 24 L. L. T. 101	110, 111
Hunt v. G. N. Ry. Co., [1891] 1 Q. B. 601, 60 L. J. Q. B. 216, 64 L. T. 118, 55 J. P. 470	271
Hunt v. Hunt, (1862), 4 D. & G. F. & J. 221, 31 L. J. Ch. 161; 5 L. T. 774, 10 W. R. 215, 8 Jur. (N. S.) 83, 15 Eng. Rep. 1168	295, 420
Hunter v. Northen Marine Insurance Co., (1888), 13 App. Cas. 717	452
Hurdman v. N. E. Ry. Co., (1878), 3 C. P. D. 168, 47 L. J. C. P. 368, 38 L. T. 339, 26 W. R. 489	66
Hutchinson v. York, Newcastle & Berwick Ry. Co., (1850), 5 Ex. 343, 19 L. J. Ex. 296, 5 Rail. Cas. 540	21
Huxam v. Thomas, (1882), 72 L. T. Newspaper, 227	180
Huxley v. Field, (1835), 2 C. M. & L. 432, 5 Tyr. 855, 1 Gale 166	143
Hymas v. Webster, (1864), L. R. 4 Q. B. 138, 30 L. J. Q. B. 21, 17 W. R. 232	64
Hyman v. Nye, (1881), 6 Q. B. D. 683, 44 L. T. 919, 45 J. P. 551	50
He v. Abercain Welsh Flannel Co., (1886), 2 L. L. R. 517	25, 186
Hildge v. Goodwin, (1831), 5 C. & P. 190	55, 71, 94
Hilgworth v. Wainley, (1900), 2 Q. B. 142, 69 L. J. Q. B. 519, 82 L. T. 647, 16 T. L. R. 281, 2 W. C. C. 118	567, 617
Imperial Loan Co. v. Stone, (1892), 1 Q. B. 599, 61 L. J. Q. B. 449; 66 L. T. 556, 56 J. P. 496, 8 T. L. J. 104	282
Imperial Wine Co., <i>In re</i> , see Shirreff's Case.	
Indermaur v. Dames, (1866), L. R. 1 C. P. 274, (1867), L. R. 2 C. P. 811, 36 L. J. C. P. 181, 16 L. T. 298, 15 W. R. 434	45, 292
Ingram v. Barnes, (1857), 7 E. & B. 115, 132, 26 L. J. Q. B. 82, 319, 5 W. R. 726, 8 Jur. (N. S.) 861	272, 278, 274, 278
Innes v. Fire Coal Co., (1901), 3 F. 335, 34 Sc. L. R. 239	94
Iron Shipbuilding Works v. Nuttall, (1888), 119 Pa. St. 149	20
Irons v. Davis & Timmins, Ltd. [1899] 2 Q. B. 830, 68 L. J. Q. B. 673, 80 L. T. 673, 47 W. R. 616, 1 W. C. C. 26	562, 563, 564

	PAGE
• Isaacson & another v. New Grand (Clapham Junction), Ltd., 1908 1 K B 589, 72 L J K. B. 227; 88 L T 291, 19 T L R. 150, 5 W. C. C. 85	38, 279, 420, 422
• Ismay, Immo & Co. v. Williamson, 1908 4 C 197, 77 L J P. C. 107, 24 T L R. 881	853, 854, 858
Jackson v. Hill, (1884) 13 Q. B. D. 618, 19 J. P. 118	271
James, <i>Ex parte</i> , Condon, <i>In re</i> , (1871), L. R. 9 Ch. 609, 43 L. J. Bank 107, 30 L. T. 773, 22 W. R. 937	584
James v. Ocean Coal Co. Ltd., 1904 2 K B 213, 73 L. J. K. B. 915, 90 L. T. 831, 52 W. R. 497, 64 J. P. 431, 20 T. L. R. 148, 6 W. C. C. 128	315, 566
James v. Westinghouse Brake Co., (1898) Times newspaper, 1st February	25
Jamson v. Life Coal Co., (1901), 5 P. 938, 40 Sc. L. R. 704, 11 Sc. L. T. 143	566
Jamson v. Russell, (1892), 19 R. 898, 29 Sc. L. R. 700	172
Jamson v. Deighton Consolidated Mines, 1902 4 C 184, 71 L. J. K. B. 857, 87 L. T. 372, 51 W. R. 112, 7 Conn. Cas. 268, 18 T. L. R. 738	295
Jeffrey v. "Frankona," (Owners of) 40 L. J. P. 41, & c. "Frankona," <i>The</i>	
Jennings v. Randall, (1799), 8 T. R. 345, 4 R. R. 680	281
Jenoure v. Delmege, 1891 4 C 73, 60 L. J. P. C. 11, 61 L. T. 814, 39 W. R. 384, 55 J. P. 500	92
Jewson v. Galt, (1886), 2 T. L. R. 113	91, 97
John v. Albion Coal Co. Ltd., (1902), 18 T. L. R. 27, 65 L. J. P. 788, 4 W. C. C. 15	405
Johnson, <i>Ex parte</i> , Johnson, <i>In re</i> , (1883), 25 Ch. D. 112, 59 L. J. Ch. 309, 50 L. T. 157, 32 W. R. 175	596, 597
Johnson v. Ad-head, (1901), 102 Law Times newspaper 10, 2 Ch. C. C. 158	668
Johnson v. Landau, 1891, 4 C 371, 61 L. J. Q. B. 90, 65 L. T. 97, 40 W. R. 405, 55 J. P. 614, 7 T. L. R. 715	13, 11, 42, 44, 276, 380, 482, 483, 484, 692, 702
Johnson v. Marshall, 1906 4 C 409, 75 L. J. K. B. 868, 94 L. T. 828, 22 T. L. R. 565, 8 W. C. C. 10	109, 410, 412
Johnson v. Mitchell, (1885), 22 Sc. L. R. 698	175
Johnston v. Great Northern Ry. Co. of Ireland, (1890), 26 L. R. Ir. 691	106, 110
Johnson v. G. W. Ry., 1904 2 K B 250, 73 L. J. K. B. 368, 91 L. T. 157, 52 W. R. 612, 20 T. L. R. 155	118, 291
Johnston v. Shaw, (1883), 21 Sc. L. R. 246	243
Johnstone v. Sutton, (1780), 1 T. R. 408, 1 Bro. P. C. 76, 1 R. R. 257	282
Jolliffe v. Wallerley Local Board, (1873), L. R. 9 C. P. 62; 43 L. J. C. P. 41, 29 L. T. 582	246
Jones v. Boyce, (1816), 1 Starkle (N. P.) 403, 18 R. R. 812	52, 84, 91
Jones v. Burford, (1884), 1 T. L. R. 187	184
Jones v. Curling, (1884), 13 Q. B. D. 202, 53 L. J. Q. B. 873; 50 L. T. 349, 32 W. R. 651	654

Table of Cases

	PAGE
Jones v. Duck, (1900), The Times newspaper, 16th March . . .	152
Jones v. Great Central Ry. Co., (1901), 18 T. L. R. 3, 66, 4 W. C. C. 23 . . .	596, 668
Jones v. Liverpool Corporation, (1885), 14 Q. B. D. 890, 54 L. J. Q. B. 845, 38 W. R. 551, 49 J. P. 311, 1 T. L. R. 389 . . .	286
Jones v. L. & N.-W. Ry. Co., (1902), 4 W. C. C. 140 . . .	568
Jones v. L. & S.-W. Ry. Co., (1901), 3 W. C. C. 46, 111 L. T. newspaper, 210 . . .	406
Jones v. Ocean Coal Co., [1899] 2 Q. B. 134, 68 L. J. Q. B. 731, 80 L. T. 582, 47 W. R. 484, 15 T. L. R. 399, 1 W. C. C. 94 . . .	523, 534
Jones v. Rhymney Iron Co., [1902] 1 K. B. 57, 71 L. J. K. B. 28; 85 L. T. 172, 50 W. R. 115, 65 J. P. 801, see <i>Ayles v. Buckeridge</i> . . .	
Jones v. Scullard, (1898) 2 Q. B. 565, 67 L. J. Q. B. 895, 79 L. T. 380, 47 W. R. 302, 11 T. L. R. 580 . . .	45, 140, 146
Joseph v. Whitnes Co., (1900), 177 Mass. 176 . . .	207
Joyce v. Capel, (1844), 8 C. & P. 370 . . .	144
Judge v. Selmes; see Selmes v. Judge . . .	
Julius, Bishop of Oxford, (1890), 5 App. Cas. 211, 49 L. J. Q. B. 577, 42 L. T. 546, 28 W. R. 726, 14 J. P. 600 . . .	580, 654
Kane v. Singer Manufacturing Co., (1904) 6 F. 658, 41 Sc. L. R. 571 . . .	259
Kearney v. London, Brighton and South Coast Ry. Co., (1870); L. R. 5 Q. B. 311, (1871), L. R. 6 Q. B. 759, 40 L. J. Q. B. 285, 24 L. T. 913, 20 W. R. 24 . . .	77
Keauey v. Nicholls, (1883), 76 Law Times newspaper, 63 . . .	201, 207
Keast v. Barrow Haematite Steel Co., (1899), 61 J. P. 56, 15 T. L. R. 141, 1 W. C. C. 99 . . .	392, 532
Keeble v. East and West India Docks, (1889), 5 T. L. R. 812 . . .	298
Keen v. Millwall Dock Co., (1882), 8 Q. B. D. 482, 51 L. J. Q. B. 277, 46 L. T. 472, 30 W. R. 509, 16 J. P. 435 . . .	247, 261
Keenan v. Flemington Coal Co., (1902), 51 L. T. 164, 40 Sc. L. R. 144; 10 Sc. L. J. 409 . . .	388
Kehler v. Schwenk, (1891), 144 Pa. St. 348, 27 Am. St. R. 631 . . .	93
Keighley, Maxstead & Co., <i>in re</i> , 1891 1 Q. B. 405, 62 L. J. Q. B. 105, 68 L. T. 61, 41 W. R. 137, 4 K. L. 7 App. M. C. 268, 9 T. L. R. 107 . . .	629
Kellard v. Rooke, (1898), 21 Q. B. D. 367, 57 L. J. Q. B. 599, 36 W. R. 875, 52 J. P. 820, 1 T. L. R. 709 . . .	135, 197, 198, 200, 206, 204, 269
Kelly v. Arrol & Co., Ltd., (1902), 7 F. 1006, 12 Sc. L. R. 605, 13 Sc. L. T. 264 . . .	472
Kelly v. Globe Sugar Refining Co., (1893), 20 R. 833, 30 Sc. L. R. 738 . . .	24, 39, 181
Kelly v. Hopkins, [1904] 2 I. R. 84 . . .	466
Kemp v. Baines, (1844), 1 Dowd & L. 556; 13 L. J. Q. B. 149, 8 Jur. 619 . . .	258
Kendall v. L. & S.-W. Ry. Co., (1872), L. R. 7 Ex. 378, 41 L. J. Ex. 184; 26 L. T. 735, 20 W. R. 886 . . .	75
Kent v. Porter, (1901), 88 Sc. L. R. 482 . . .	498

	PAGE
Kent County Council v Folkstone Corporation, [1905], 1 K. B. 680, 71 L. J. K. B. 452, 92 L. T. 303, 53 W. R. 471, 69 J. P. 125, 3 L. G. R. 434, 21 T. L. R. 269	246
Kent County Council v Gerard, (Lord), <i>see</i> Gerard (Lord) v Kent C. C.	
Kettlewell v Paterson, (1896), 21 Sc. L. R. 95	160, 205, 218
Kiddle v Lovett, (1885), 16 Q. B. D. 605, 34 W. R. 518	169
Kilpatrick v Wemyss Coal Co., Ltd., [1907] S. C. 320; 41 Sc. L. R. 255	610, 614
King v Henkle, (1890), 60 Am. R. 119	266
King, The v Dixon, (1814), 3 M. & S. 117, 4 Camp. 12, 15 R. R. 381	155
King, The v Hampden, (1617), 11 How. St. Tr. 825	295
King, The v Hushingham, (1814), 2 M. & S. 554, 15 R. R. 350	73
Kingston's, Duchess of, Case, (1776), 20 How. St. Tr. 517, 1 Leach, C. C. 116, 2 Sm. L. C. (11th ed.) 731	417
Knight v Cullett, [1902] 1 K. B. 311, 71 L. J. K. B. 65, 85 L. T. 539, 50 W. R. 115, 66 J. P. 52, 18 T. L. R. 26, 1 W. C. C. 42	400, 491
Knight v North Metropolitan Tramways Co., (1898), 11 T. I. R. 286, 78 L. T. 227	153
Kniveton v Northern Employers Mutual Indemnity Co., [1902] 1 K. B. 880, 71 L. J. K. B. 588, 86 L. T. 721, 50 W. R. 701, 4 W. C. C. 97, <i>sub nom</i> N. E. M. I. Co. v Kniveton, 18 T. L. R. 504	585, 639
Korten v. West Sussex County Council, (1901), 19 T. L. R. 854	156
Lamb v G. N. Ry. Co., [1901] 2 Q. B. 281, 69 L. J. Q. B. 189, 65 L. T. 226, 39 W. R. 175, 56 J. P. 22, 7 T. L. R. 115	271
Lamley v East Bedford Corporation, (1891), 55 J. P. 133	201
Lamphear v Brathwait, (1615), 1 Sm. L. C. (11th ed.) 111, 1 Hob. 423, Moore 860, Brown & Gold T. 80 Eng. Rep. 255	697
Lampman v Gainsborough, (1888), 17 Ont. R. 191	108
Lancashire Insurance Co. v Commissioners of Inland Revenue, [1899] 1 Q. B. 853, 68 L. J. Q. B. 143, 79 L. T. 131, 17 W. R. 896, 63 J. P. 21, 15 T. L. R. 119	590
Lane v. Cotton, (1701), 1 Loul. Raym. 646, 1 Salk. 17, 12 Mod. 189	298
Lathignd v Maple, (1865), 14 C. B. N. S. 253, 11 Jm. (N. S.) 177, 12 L. T. 111, 13 W. R. 469	256
Larbey v Greenwood, (1898), Times, 23rd July	255
Laugher v Pointer, (1826), 5 B. & C. 547, 4 L. J. (O. S.) K. B. 309, 8 D. & R. 550, 29 R. R. 319	142
Lawler v Lunden, (1876), Ir. R. 10 C. L. 188, 10 Ir. L. T. 86	267
Lawrence v Accident Insurance Co., (1881), 7 Q. B. D. 216, 50 L. J. Q. B. 522, 45 L. T. 29, 29 W. R. 602, 45 J. P. 781	16
Lawrence v Todd, (1863), 14 C. B. N. S. 554, 82 L. J. M. C. 288; 8 L. T. 505; 11 W. R. 835, 10 Jur. (N. S.) 179	276
Lawrie v James Brown & Co., Ltd., [1903] S. C. 705, 45 Sc. L. R. 477	664
Lax v Darlington Corporation, (1879), 5 Ex. D. 28; 49 L. J. Ex. 105, 41 L. T. 489, 28 W. R. 221, 44 J. P. 312	87

Table of Cases

xlix

	PAGE
<i>Lay v. Midland Ry. Co.</i> , (1874), 30 L. T. 529, (1875), 84 L. T. 90	77, 98
<i>Ledward v. Hassells</i> , (1886), 2 K. & J. 870, 25 L. J. Ch. 311, 2 Jur. (N. S.) 277; 4 W. R. 515, 69 Eng. Rep. 825	592
<i>Ledwidge v. Hathaway</i> , (1898), 170 Meas. 348	245
<i>Lee v. Cortonwood Collieries</i> , (1902), 4 W. C. C. 82	611
<i>Lee v. Lancashire and Yorkshire Ry. Co.</i> , (1870), L. Tw. 6 Ch. 527, 25 L. T. 77, 49 W. R. 729	117
<i>Lee v. W. Bard & Co., Ltd.</i> , (1904), 45 Sc. L. R. 717	561
<i>Leech v. Garzide</i> , (1895), 1 T. L. R. 391	270, 276
<i>Leech v. Life and Health Assurance Association</i> , [1901] 1 K. B. 707, 70 L. J. K. B. 544, 84 L. T. 111, 19 W. R. 182, 47 T. L. R. 351, 8 W. C. C. 202	546, 590, 639
<i>Leggett & Sons v. Burke</i> , (1902), 1 F. 601, 39 Sc. L. R. 148, 9 Sc. L. T. 518	172, 519
<i>Luggott v. G. N. Ry. Co.</i> , (1876), 1 Q. B. D. 599, 45 L. J. Q. B. 557, 35 L. T. 331, 24 W. R. 781	115
<i>Lo Javie v. Gould</i> , [1903] 1 Q. B. 491, 62 L. J. Q. B. 35, 68 L. T. 626, 44 W. R. 408, 57 L. P. 181, 4 R. 271	57, 58, 81
<i>Leman v. Housley</i> , (1874), 1 R. 10 Q. B. 65, 44 L. J. Q. B. 22, 31 L. T. 833, 28 W. R. 235	678
<i>London v. London Road-Car Co.</i> , (1897), 4 T. L. R. 188	115
<i>Leonard v. William Baird & Co.</i> , (1901), 3 F. 891, 38 Sc. L. R. 649	520, 529
<i>Leslie Martin v. Workman, Clark & Co., Ltd.</i> , (No. 1), (1899), 33 L. R. T. 183, (No. 2), (1900), 34 L. L. T. R. 11	612, 668
<i>Levering v. St. Katherine Dock Co.</i> , (1847), 3 T. L. R. 607	200, 288
<i>Lewin v. G. W. Ry. Co.</i> , (1877), 3 Q. B. D. 135, 47 L. J. Q. B. 131, 37 L. T. 771, 26 W. R. 253	195, 396, 397
<i>Light v. Clouston</i> , (1848), 1 Taunt. 112, 9 R. R. 711	101
<i>Lilley v. Elwin</i> , (1848), 11 Q. B. 742, 17 L. J. Q. B. 132, 12 Jur. 628	273
<i>Limpson v. London General Omnibus Co.</i> , (1902), 1 H. & C. 526, 32 L. J. 15x. 34, 7 L. T. 611, 11 W. R. 119, 9 Jur. (N. S.) 333, 1, 10, 13, 112, 188, 410, 414	414
<i>Lindsay v. McGlashan & Son, Ltd.</i> , [1908] 8 C. 762, 45 Sc. L. R. 559	464
<i>Lanklater v. Webster</i> , (1901), 6 W. C. C. 50	618
<i>Little v. McLellan</i> , (1904), 2 F. 887, 37 Sc. L. R. 287, 7 Sc. L. T. 313	424
<i>Little v. Nelson (Summit) Iron and Coal Co.</i> , (1855), 17 Dumblop 810, 27 Sc. Jur. 135	46, 47
<i>Lloyd v. General Iron Screw Collier Co.</i> , (1864), 3 H. & C. 281, 33 L. J. Ex. 269, 40 Jur. (N. S.) 661, 10 L. T. 586, 12 W. R. 882	16
<i>Lloyd v. Ogilby</i> , (1850), 5 C. D. N. S. 607	58
<i>Lloyd v. Woodland Brothers</i> , (1902), Times newspaper, 7th November	83
<i>Loader v. London and East and West India Dock Joint Committee</i> , (1894), 65 L. T. 671, 63 J. P. 165, 8 T. L. R. 5	63, 81, 172
<i>Lobb v. Amos</i> , (1886), 7 N. S. W. R. (Law) 93	279, 280, 289
<i>Lochgelly Iron and Coal Co. v. Sinclair</i> , [1907] S. C. 3, 14 Sc. L. R. 750	667
<i>Logue v. Fullerton, Hodgart & Barclay</i> , (1901), 3 F. 1006, 38 Sc. L. R. 788, 9 Sc. L. T. 152	373, 385, 402
<i>London and Edinburgh Shipping Co. v. Brown</i> , (1905), 7 F. 488, 42 Sc. L. R. 357, 12 Sc. L. T. 694, 760	377

Table of Cases

	PAGE
London and Glasgow Engineering Co. v. Falconer, (1901), 38 So. L. R. 381, <i>see</i> Falconer v. London, &c., Engineering Co.	
London, Mayor of, and Tubbs Contract, <i>In re</i> , [1894] 2 Ch. 524; 68 L. J. Ch. 580, 70 L. T. 719, 7 R. 265; 10 T. L. R. 481	396
London, Tilbury & Southend Ry. Co. and Trustees of Gowers' Walk Schools, <i>In re</i> , (1889), 24 Q. B. D. 326, 59 L. J. Q. B. 162, 62 L. T. 806, 38 W. R. 343, 6 T. L. R. 120	69
"Longford," <i>The</i> , (1889), 14 P. D. 81, 58 L. J. P. 33, 60 L. T. 873, 37 W. R. 472, 6 A. & P. M. C. 371	246
Loughmore v. G. W. Ry. Co., (1905), 19 C. B. N. S. 183, 35 L. J. C. P. 185	172
Lord Advocate and Trustees of the Clyde Navigation Co. v. Blantyre (Lord), (1879), 4 App. Cas. 770	78
Losh v. Richard Evans & Co., Ltd., (1902), 51 W. R. 243, 19 T. L. R. 142, 5 W. C. C. 17	396
Lovetree v. London, Brighton & South Coast Ry. Co., (1864), 16 C. B. N. S. 669, 33 L. J. C. P. 329, 10 L. T. 714, 12 W. R. 988, 10 Jur. (N. S.) 879	78
Lovell v. Charrington, (1882), 72 L. T. newspaper 356	138
Lovell & Christmas v. Beauchamp, [1911] A. C. 607, 68 L. J. Q. B. 802, 71 L. T. 587, 43 W. R. 129, 1 Mans. 407, 11 R. 15	282
Lovell v. Howell, (1875), 1 C. P. D. 161, 45 L. J. C. P. 387, 34 L. T. 188, 21 W. R. 672	21
Low v. Barchard, (1903), 8 Ves. 183; 7 R. R. 4, 32 Eng. Rep. 308	114
Low v. Myers & Son, [1906] 2 K. B. 265, 75 L. J. K. B. 651, 95 L. T. 35, 22 T. L. R. 614, 8 W. C. C. 22	599, 610, 631
Low v. Pearson, [1899] 1 Q. B. 261, 68 L. J. Q. B. 122, 79 L. T. 654, 47 W. R. 183, 15 T. L. R. 124, 1 W. C. C. 5	374, 375, 377, 386
Lowth v. Hinton, [1899] 1 Q. B. 1003, 68 L. J. Q. B. 465, 80 L. T. 841, 47 W. R. 606, 15 T. L. R. 264, 1 W. C. C. 46	196, 197
Lowther v. Bentinck, (1874), L. R. 19 Eq. 108, 14 L. J. Ch. 107, 31 L. T. 719, 23 W. R. 156	449
Lowther v. Radnor (Earl), (1906), 8 East 113, 20 R. R. 542 n.	272, 274
Lowry v. Sheffield Coal Co., (1907), 24 T. L. R. 112	181
Lunn v. Glasgow & S. W. Ry. Co., (1900), 8 F. 546, 43 Sc. L. R. 872	46
Lygo v. Newbold, (1854), 9 Ex. 802, 23 L. J. Ex. 108, 2 C. L. R. 449, 2 W. R. 158	93
Lykes v. Southend-on-Sea Corporation, [1905] 2 K. B. 1, 74 L. J. K. B. 484, 92 L. T. 546, 69 J. P. 198, 3 L. G. R. 691, 21 T. L. R. 889	246
Lynch v. Allyn, (1898), 160 Mas. 248	168
Lynch v. Nordin, (1841), 1 Q. B. 29, 10 L. J. Q. B. 73, 1 P. & D. 672, 6 Jur. 727	41, 93
Lysons v. Knowles, [1901] A. C. 79, 70 L. J. K. B. 170, 84 L. T. 66, 49 W. R. 686; 65 J. P. 388, 17 T. L. R. 156, 4 W. C. C. 1	520, 526
McAdam v. Harvey, [1908] 2 I. R. 511; 36 Ir. L. T. 89	388
McAllan v. Perthshire C. C. Western District, (1906), 8 F. 739; 43 So. L. R. 592, 14 Sc. L. T. 86	43
	388

Table of Cases

li

	PAGE
<i>M'Arthur v. Dominion Cartridge Co.</i> , [1905] A. C. 72; 74 L. J. M. C. 30; 91 L. T. 598, 59 W. R. 305; 21 T. L. R. 47 ...	78
<i>M'Avan v. Boase Spinning Co., Ltd.</i> (1901), 8 F. 1048, 38 So. L. R. 772; 9 Sc. L. T. 152 ...	682, 686, 687
<i>M'Avoy v. Young's Paraffin Light and Mineral Oil Co.</i> , (1891), 9 R. 100; 19 Sc. L. R. 61 ...	134, 137, 258
<i>McCabe v. Guinness</i> , (1875), 1r R. 9 C. L. 510 ...	106
<i>McCabe v. Shields</i> , (1900), 175 Mass. 438 ...	206
<i>McCallum v. North British Ry. Co.</i> , (1893), 20 R. 345, 30 Sc. L. R. 427 ...	41
<i>McCarthy v. British Shipowners' Co.</i> , (1883), 10 L. R. Ir. 384, 17 Ir. L. T. 21 ...	172
<i>McCarthy v. Jacob & Nicholson</i> , (not reported) ...	291
<i>McClherty v. Gale Manufacturing Co.</i> , (1893), 19 Ont. App. 117 ...	159, 180
<i>McCord v. Cammell & Co.</i> , (1896) A. C. 57, 65 L. J. Q. B. 202, 78 L. T. 134, 60 J. P. 140, 12 T. L. R. 98 ...	214, 235, 236
<i>McCready v. Dunlop</i> , (1900), 37 Sc. L. R. 779, see <i>Dunlop v. McCready</i> ...	
<i>McDonagh v. Mac Clellan</i> , (1886), 13 R. 1000, 23 Sc. L. R. 717 ...	117, 243
<i>McDonald v. Owners of S.S. "Hammon"</i> , 1903; 2 K. B. 926, 24 T. L. R. 887 ...	370
<i>Macdonald v. Udd-stone Coal Co., Ltd.</i> , (1896), 23 R. 504, 31 Sc. L. R. 351, 3 Sc. L. T. 241 ...	23
<i>Macdonald v. Wylhe</i> , (1898), 1 F. 310, 16 Sc. L. R. 262 ...	100
<i>Mellowall v. G. W. Ry.</i> , [1903] 2 K. B. 331, 72 L. J. K. B. 652, 88 L. T. 825, 19 T. L. R. 512 ...	71
<i>McFayden v. Balmellington Lion Co.</i> , (1897), 24 R. 927, 34 Sc. L. R. 266, 4 Sc. L. T. 245 ...	245
<i>Macfarlane v. Thompson</i> , (1884), 12 R. 212, 22 Sc. L. R. 171 ...	161, 179
<i>Methuen v. Palmer's Shipbuilding Co.</i> , (1882), 10 Q. B. D. 5, 62 L. J. Q. B. 25, 47 L. T. 346, 31 W. R. 118, 47 J. P. 70 ...	135, 162, 163, 165, 170
<i>McGovern v. Tancred</i> , (1886), 13 R. 1013, 21 Sc. L. R. 787 ...	262
<i>McGovern v. Cooper</i> , (1901), 4 F. 219, see <i>Cooper v. McGovern</i> ...	
<i>McGroarty v. John Brown & Co.</i> , (1900), 8 F. 809, 41 Sc. L. R. 508, 14 Sc. L. T. 60 ...	407
<i>McGregor v. Dan-ken</i> , (1899), 1 F. 536, 36 Sc. L. R. 393 ...	443, 447, 493
<i>MacGregor v. Kelly</i> , (1849), 3 R. 704, 6 D. & L. 615, 18 L. J. Ex. 391 ...	265
<i>McGregor v. Ross</i> , (1883), 10 R. 725, 20 Sc. L. R. 162 ...	98, 96
<i>McHaig v. Campbell</i> , (1767), (Sc.), Mo. 12541 ...	107
<i>McIntosh v. Stewart</i> , (1900), 19 N. Z. L. R. 152 ...	176
<i>McIntyre v. A. Rodger & Co.</i> , (1904), 6 F. 176, 41 Sc. L. R. 107, 11 Sc. L. T. 467 ...	378
<i>McInulty v. Prunrose</i> , (1897), 24 R. 442, 14 Sc. L. R. 834, 1 Sc. L. T. 286 ...	45, 172
<i>MacKay v. Commercial Bank of New Brunswick</i> , (1873), L. R. 5 P. C. 394; 43 L. J. P. C. 31, 30 L. T. 180, 22 W. R. 478 ...	143
<i>MacKay v. Roffe</i> , [1908] S. C. 174, 45 Sc. L. R. 178 ...	426
<i>MacKay v. Watson</i> , (1897), 24 R. 393, 34 Sc. L. R. 314 ...	186
<i>Mackenzie v. Coltness Iron Co.</i> , (1903), 6 F. 8; 41 Sc. L. R. 11, 11 Sc. L. T. 360 ...	38

	PAGE
M'Keehole v. Conper, (1887), 14 R. 345; 24 So. L. R. 252	91
M'Kenna v. United Collieries, Ltd., (1906), 8 F. 969; 43 Sc. L. R. 713	658
McKelvin v. "The City of London," (1892), 22 Ont. R. 70	53
Mackie v. Strachan, Kinnmond & Co., (1896), 23 R. 1080, 33 Sc. L. R. 764	118
M'Killop v. North British Ry. Co., (1896), 23 R. 770; 33 Sc. L. R. 586, J. Sc. L. R. 25	23
McKinnon v. Barclay, see Osborne v. Barclay.	
McLean v. Cars & Holmes, (1899), 1 F. 478, 36 Sc. L. R. 678, 7 Sc. L. T. 26	605
McLean v. Cole, (1899), 175 Mees. 5	186
McLachlan v. Steamship "Peterl" Co., Ltd., (1896), 21 R. 753, 33 Sc. L. R. 634, 4 Sc. L. T. 19	54, 182, 185
M'Langhlin v. Clayton, (1899), 1 W. C. C. 116, Times newspaper, 28th February	619
M'Leod v. Pina, (1893), 20 R. 381	214, 259, 267
McMahon v. Field, (1881), 7 Q. B. D. 591, 50 L. J. Q. B. 552, 45 L. T. 381, 46 J. P. 215	87
McMahon v. Mulline, (1899), 174 Mees. 320	171
M'Manus v. Crickott, (1800), 1 East 106, 5 R. R. 518	150
M'Manus v. Hay, (1882), 9 R. 425, 19 Sc. L. R. 315 184, 203, 203, 212	
M'Millan v. Barclay, Curle & Co., Ltd., (1899), 2 F. 91, 37 Sc. L. R. 61	500
McMullen v. Newbourn Coal Co., (1896), 23 R. 759, 31 Sc. L. R. 504, 4 Sc. L. T. 34	171
M'Noill v. Kinnell Canal and Coking Coal Co., Ltd., (1898), 25 R. 962, 35 Sc. L. R. 768	21
McNicholas v. Dawson & Son, (1899), 174 R. 773 64 L. J. Q. B. 470, 80 L. T. 317, 47 W. R. 500, 15 F. L. R. 212, 1 W. C. C. 80 369, 373	
M'Nicol v. Spicers, Gibb & Co., (1899), 1 F. 604, 36 Sc. L. R. 428, 6 So. L. T. 353	411
M'Quade v. Dixon, (1887), 14 R. 1039, 21 Sc. L. R. 727	163
McQuibban v. Menzies, (1900), 2 F. 732, 37 Sc. L. R. 524, 7 Sc. L. T. 432	389
Magee v. Dalglish, Falconer & Co., (1884), 11 R. 857, 21 Sc. L. R. 569	254
Magee v. Martin, (1882), 16 Ir. L. T. 5	258
Maguire v. Middlesex Railroad Co., (1871), 115 Mass. 299	91
Main Colliery Co. v. Davies, [1900] A. C. 358, 69 L. J. Q. B. 755, 88 L. T. 88; 65 J. P. 20, 16 T. L. R. 460, 2 W. C. C. 108 463, 466 463, 470, 471, 549	
Manby v. Scott, (1659), 1 Lev. 4, 1 Mod. 124, 1 Sid. 109; 2 Sm. L. C. (11th ed.) 416, 83 Eng. Rep. 263, 86 ib. 781	407
Manchester v. Carlton Iron Co., Ltd., (1904), 89 L. T. 730; 52 W. R. 291, 68 J. P. 20; 20 T. L. R. 155	590
Mangan v. Atterton, (1866), L. R. 1 Ex. 299, 4 H. & C. 888, 35 L. J. Ex. 161, 14 L. T. 411; 14 W. R. 711	41, 98, 94
Mann v. Ward, (1892), 8 T. L. R. 699	55, 56, 98
Manzoni v. Douglas, (1890), 6 Q. B. D. 145; 50 L. J. Q. B. 289; 29 W. R. 425, 45 J. P. 391	51, 72, 73, 76

Table of Cases

liii

	PAGE
Masdorf and Accident Assurance Co., <i>In re</i> , [1903] 1 K. B. 584; 73 L. J. K. B. 382, 89 L. T. 339, 19 T. L. R. 374	56
Markov v. Tolworth Joint Hospital District Board, [1900] 2 Q. B. 464; 69 L. J. Q. B. 738; 85 L. T. 28, 61 J. P. 647, 16 T. L. R. 411	106, 216, 247
Markham v. Stanford, (1861), 14 C. B. N. S. 376, 8 L. T. 277	295
Marley v. Osborn, (1894), 10 T. L. R. 888	209, 218
Marmay v. Scott, [1899] 1 Q. B. 986, 64 L. J. Q. B. 736, 47 W. R. 666, 15 T. L. R. 420	26, 53, 54, 181
Marnor v. Workman (No. 1), (1899), 83 L. T. 189, (No. 2), (1899), 84 L. T. 14	612, 668
"Marpesia," <i>The</i> , (1872), L. R. 4 P. C. 212, 8 Moore, P. C. (N. S.) 164, 26 L. T. 333	16
Marrow v. Flimby & Broughton Moss Coal and Fire Brick Company, Ltd., [1895] 1 Q. B. 584, 67 L. J. Q. B. 976, 79 L. T. 897, 14 T. L. R. 543	215, 256, 276, 291, 398
Marshall v. East Hyllysell Coal Co., (1904), 91 L. T. 360, 21 T. L. R. 491, 7 W. C. C. 19	119
Martin v. Baltimore Railroad Co., [1893], 151 F. S. (41 Davis) 673	260
Martin v. Connal's Quay Alkali Co., (1881), 38 W. R. 216	186, 213
Martin v. Midland Ry. Co. 9 T. L. R. 511, see Midland Ry. Co. v. Martin	
Martin v. Temperley, (1841), 1 Q. B. 298, 12 L. J. Q. B. 129, J.G. & P. 97, 7 Jur. 150	119, 245, 248
Martin v. Wards, [1887], 14 R. 811, 21 N. L. R. 546	92, 97
Mason v. Beittam, (1889), 18 Ont. R. 1	112
Mason v. Dean, (1880), 1 Q. B. 776, 64 L. J. Q. B. 378, 82 L. T. 133, 18 W. R. 311, 61 J. P. 233, 36 F. L. R. 232	193
Mason v. Langford, [1888] 4 T. L. R. 107	292
Masters v. Jones, [1891], 10 T. L. R. 101	140, 255
Matthews v. Bedworth Brick and Tile Co., (1892) 3 W. C. C. 124, 106 Law Times newspaper, 185	376
Mayer v. Park, (1905), 8 F. 250, 41 Sc. L. R. 191	614
Maxim Nordenfellt Guns & Ammunition Co. v. Nordenfellt, [1891], 1 Ch. 680, 2 R. 594, 62 L. T. Ch. 749, 69 L. T. 471, 12 W. R. 38, 9 T. L. R. 150, aff. in H. L. <i>sub nom.</i> Nordenfellt v. Maxim, & Co., <i>q. v.</i>	205
Maxwell v. Wolesley, (Viscount), [1907] 1 K. B. 274, 76 L. J. K. B. 161, 96 L. T. 4, 23 T. L. R. 157	262
May v. Burdett, (1846), 9 Q. B. 101, 16 L. J. Q. B. 64, 10 Jur. 692	51
May v. Chapman, (1847), 16 M. & W. 835	106
Maynard v. Peter Robinson, (1904), 89 L. T. 116, 19 T. L. R. 492	272
Medway v. Greenwich Inland Locomotive Co., Ltd., (1899), 14 T. L. R. 291	53, 198, 202, 210
Mellors v. Shaw, (1861), 1 B. & S. 427, 30 L. J. Q. B. 333; 7 Jur. (N. S.) 845, 9 W. R. 749	22
Membery v. G. W. Ry. Co., (1881), 14 App. Cas. 179, 58 L. J. Q. B. 563, 61 L. T. 666, 48 W. R. 145, 54 J. P. 241, 5 T. L. R. 468	6, 20
Menzies v. McQuibban (1900), 2 F. 732, see McQuibban v. Menzies	
Merry v. Nickalls, (1879), L. R. 8 Ch. 205, 42 L. J. Ch. 179, 28 L. T. 296, 21 W. R. 385	106

B.E.L.

Merryweather v. Nixon, (1799), 1 Sm. L. C. (11th ed.) 398; 8 T. R. 186, 16 R. R. 810	65, 164, 696
Metcalf v. Great Boulder Proprietary Gold Mines, (1906), 3 C. L. R. (Australia), 513	166
Metropolitan Ry. Co. v. Jackson, (1877), 8 App. Cas. 193, 47 L. J. C. P. 308, 87 L. T. 679, 26 W. R. 175	63, 71, 82, 298, 404
Mout v. G. M. Ry. Co., (1895) 2 Q. B. 397, 61 L. J. Q. B. 657, 73 L. T. 247; 43 W. R. 630, 59 J. P. 662, 14 R. 620, 11 T. L. R. 517	4, 96, 116
Middleton v. Berwickshire County Council, (1900), 2 F. 392, 87 So. L. R. 297; 74 L. T. 230	199
Midland Counties District Bank, Ltd. v. Attwood, (1905), 1 Ch. 357; 74 L. J. Ch. 286, 92 L. T. 330, 12 Manson, 20, 21 T. L. R. 175	11
Midland Ry. Co. v. Martin, (1898) 2 Q. B. 172, 62 L. J. Q. B. 517; 69 L. T. 354, 58 J. P. 811, 17 Cox C. C. 687, 5 R. 149, 9 T. L. R. 511	251
Midland Ry. Co. v. Sharpe, (1901) 1 C. 319, 73 L. J. K. B. 666, 91 L. T. 181, 53 W. R. 114, 20 T. L. R. 516, 6 W. C. C. 119	632, 563
Midwood v. Manchester Corporation, (1905) 2 K. B. 597, 71 L. J. K. B. 884, 93 L. T. 526, 54 W. R. 37, 69 J. P. 144, 21 T. L. R. 667, 8 L. G. R. 119	75
Milgott v. Colville, (1879), 1 C. P. D. 238, 48 L. J. C. P. 696, 10 L. T. 747, 27 W. R. 714, 14 Cox C. C. 805	368
Mildred v. Maspons, (1843), 8 App. Cas. 871, 53 L. J. Q. B. 33, 49 L. T. 635, 32 W. R. 125, 5 Asp. M. C. 182	195
Milford Dock Co. v. Milford Haven U. D. C., (1901) 65 J. P. 493	246
Milligan v. Mun, (1891), 19 R. 18, 29 So. L. R. 36	178
Miller v. Dalgety, (1844), 1 W. N. 161, 2 W. N. 17 (N. S. W.)	215
Mills v. Armstrong ("The Bermina"), (1844), 13 App. Cas. 1, 57 L. J. P. 65, 58 L. T. 423, 96 W. R. 870, 52 J. P. 212, 1 T. L. R. 860, 6 Asp. M. C. 257	65, 85, 84, 97, 93
Millward v. Midland Ry. Co., (1884), 14 Q. B. D. 68, 51 L. J. Q. B. 202, 52 L. T. 256, 33 W. R. 366, 49 J. P. 453	209, 319
Milne v. Town-end, (1892), 19 R. 830, 29 So. L. R. 717	29, 177
Milner v. G. N. Ry., (1900) 1 Q. B. 705, 69 L. J. Q. B. 127, 82 L. T. 187, 48 W. R. 387, 61 J. P. 291, 16 T. L. R. 219, 2 W. C. C. 51	195, 502, 503
Missouri Steamship Co., <i>In re</i> , (1888), 12 Ch. D. 321, 54 L. J. Ch. 721, 61 L. T. 316, 37 W. R. 696, 6 Asp. M. C. 423; 5 T. L. R. 438	479
Mitchell & Lard and Governor of Ceylon, <i>In re</i> , (1888), 11 Q. B. D. 408, 57 L. J. Q. B. 524, 59 L. T. 812, 36 W. R. 878	641
Mitchell v. Coats Iron and Steel Co., (1886), 23 So. L. R. 108	163
Mitchell v. Craswell, (1859), 18 C. B. 287, 22 L. J. C. P. 100, 17 Jur. 716, 1 W. R. 168	149
Mitchell v. Glamorgan Coal Co., (1907), 23 T. L. R. 588, 9 W. C. C. 16	76, 98, 370
"M. Moxham," <i>The</i> , (1870), 1 P. D. 107, 46 L. J. P. 17, 81 L. T. 559, 21 W. R. 650	463
Moffatt v. Bateman, (1869) L. R. 3 P. C. 115, 22 L. T. 140, 6 Moore P. C. N. S. 369	49, 77

Table of Cases

lv

	PAGE
Monaghan v. Horn, (1881), 7 Can. S. C. R. 409	119
Monaghan v. United Collieries, Ltd., (1900), 3 F. 129; 33 Sc. L. R. 92, 8 Sc. L. T. 261	495, 506
Monahan v. Moore, (1897), 21 V. L. R. 230	188
Monck v. Hilton, (1875), 2 Ex. D. 263, 16 L. J. M. 161, 36 L. T. 61, 25 W. R. 373	142
"Monte Rosa," The, [1893] P. 28, 62 L. J. P. 20, 64 L. T. 299, 41 W. R. 304, 7 Asp. M. C. 826	90
Mooney v. Edinburgh & District Tramway Co., Ltd., (1901), 1 F. 390, 84 Sc. L. R. 200	503
Moore v. Gunnson, (1849), 34 L. J. Q. B. 169, 5 T. L. R. 177	163, 171, 205, 223
Moore v. Metropolitan Ry. Co., (1872), L. R. 8 Q. B. 36, 12 L. J. Q. B. 24, 25 L. T. 579, 21 W. R. 145	151
Moore v. Ramsom's Dock Committee, (1898), 11 T. L. R. 539	58
Moore v. Ross, (1890), 17 R. 796, 27 Sc. L. R. 626	164, 185, 267
Moorhouse v. Lee, (1864), 1 F. & F. 354	275
Morden v. Porter, (1860), 7 C. B. N. S. 641, 29 L. J. M. C. 213, 1 L. T. 403, 8 W. R. 262	156
Morgan v. Hutehins, (1890), 59 L. J. Q. B. 197, 18 W. R. 112, 6 T. L. R. 219	159, 166, 176
Morgan v. London General Omnibus Co. (1885) 11 Q. B. D. 832, 53 L. J. Q. B. 352, 51 L. T. 213, 12 W. R. 579, 19 J. P. 504	203, 270, 272, 274, 277
Morgan v. Sun (1857), 11 Moo. P. C. 307, 30 L. T. (O. S.) 236, sub nom. "City of London," The, Swabe, 300	72
Morgan v. Vale of North Ry. Co., (1865), L. R. 1 Q. B. 149, 5 B. & S. 796, 35 L. J. Q. B. 23, 13 L. T. 561, 14 W. R. 144	11
Morris v. Atkins & Brooker, (1903), 18 F. L. R. 628	68
Morris v. House Spinning Co., Ltd., (1895) 22 R. 116, 12 Sc. L. R. 211	39
Morris v. Lambeth Borough Council, (1901), 22 F. L. R. 22	379
Morris v. Northern Employers' Mutual Indemnity Co., 1902 2 K. H. 165, 71 L. J. K. B. 531, 86 L. F. 549, 30 W. R. 515, 66 J. P. 641, 18 T. L. R. 635, 1 W. C. C. 38	545, 586, 639
Morrison v. Bauld, (1882), 10 R. 271, 20 Sc. L. R. 18	131, 147, 217, 214, 251, 276
Morrison v. M. Air (1896), 23 R. 361	70
Morrison v. Scottish Employers' Liability and Accident Assurance Co., (1898) 16 R. 212, 26 Sc. L. R. 121	134
Mors-le-Blanch v. Wilson, (1878), L. R. 8 C. P. 227, 42 L. J. C. P. 70, 28 L. T. 415, 1 Asp. M. C. 605	697
Morten v. Marshall, (1863), 2 H. & C. 305, 33 L. J. Ex. 54; 9 Jur. (N. S.) 651, 8 L. T. 462	205
Morton v. Quick (1878), 26 W. R. 411	355
Morton v. Worward, [1902] 2 K. B. 276, 71 L. J. K. B. 786, 86 L. T. 878; 51 W. R. 54, 66 J. P. 660, 1 W. C. C. 113	570, 577, 625, 685
Mountain v. Parr, 1899; 1 Q. B. 305, 68 L. J. K. B. 147, 80 L. T. 842, 47 W. R. 353, 15 T. L. R. 262, 1 W. C. C. 110	631, 671, 677

	PAGE
Mowbray v Merryweather, [1895] 2 Q. B. 610, 65 L. J. Q. B. 50, 73 L. T. 459, 14 W. R. 49, 59 J. P. 390, 12 T. L. R. 11, 11 R. 767	53
Moyse v Wm Dixon, Ltd., (1905), 7 F. 396, 42 Sc. L. R. 319, 12 Sc. L. T. 658	472
Moyle v Jenkins, (1881), 8 Q. B. D. 116, 51 L. J. Q. B. 112, 46 L. T. 472, 30 W. R. 321	260
Mulleu v Stewart & Co., Ltd., (1908), 45 Sc. L. R. 729	377, 388
Mulligan v McAlpine, (1888), 15 R. 739, 25 Sc. L. R. 389	163, 186
Mullins v Collins, (1876), 1. H. 9 Q. B. 292, 23 L. J. M. C. 674, 29 L. T. 898, 23 W. R. 297	155
Mulhoney v Todd and the Lord Mayor, etc., of Bradford, 25 T. L. R. 103	450, 181
Munday v Thames Ironworks Co., (1882), 10 Q. B. D. 59, 52 L. J. Q. B. 119, 47 L. T. 351	252, 253
Munster v Cammell & Co., (1882), 21 Ch. D. 183, 51 L. J. Ch. 741, 47 L. T. 34, 30 W. R. 812	156
Murray v Calderwood, (1899), 1 F. 634, 36 Sc. L. R. 618	611
Murphy v. G. N. Ry. Co. of Ireland, (1897), 2 I. R. 301	70
Murphy v Phillips, (1876), 85 L. T. 477, 24 W. R. 617	26, 23, 31, 179
Murphy v. Smith, (1865), 19 C. B. N. S. 361, 12 L. T. 605	11, 208
Murphy v. Smith, (1866), 11 R. 985, 23 Sc. L. H. 709	71
Murphy v. Wilson, (1883), 52 L. J. Q. B. 621, 48 L. T. 788, 47 J. P. 565, 48 J. P. 24	235, 239
Murray v. Currie, (1870), 1. R. 8 C. P. 24, 40 L. J. C. P. 26, 23 L. T. 557, 19 W. R. 104	13, 140, 296
Murray v. Gourlay, [1908], 8 C. 760, see Gourlay v Murray	
Murray v. Merry, (1890), 17 R. 815, 27 Sc. L. R. 466	159
Murray v. Strel (1885), 12 R. 945, 22 Sc. L. R. 680	211, 258
Nash v. Cunard Steamship Co., (1891), 7 T. L. R. 397	10
^o Neagle v. Nixon's Navigation Co., Ltd., 1901 1 K. B. 179, 71 L. J. K. B. 105, 90 L. T. 19, 52 W. R. 350, 68 J. P. 297, 20 T. L. R. 160	683
Neale v. Electric & Ordnance Accessories Co., 1906, 2 K. H. 568, 75 L. J. K. B. 971, 95 L. T. 592, 22 T. L. R. 732, 8 W. C. C. 66	118, 122, 124, 127
Nelson v. Kerr & Mitchell, (1901), 3 F. 893, 38 Sc. L. R. 615, 9 Sc. L. L. 85	532
Nelson v. Maudslay, Son & Field (not reported)	587
Nelson v. Scott, (1892), 19 R. 125, 29 Sc. L. R. 154	187
New South Wales (Bank of) v. Owston, see Bank of New South Wales v. Owston	
Nicholls v. Hall, (1873), L. R. 8 C. P. 322, 42 L. J. M. C. 105, 28 L. T. 478, 21 W. R. 579	604
Nichols v. Marsland, (1875), 1. R. 10 Ex. 255, (1876), 2 Ex. D. 1, 46 L. J. Ex. 174, 85 L. T. 745, 25 W. R. 173	50, 59
Nicholson v. Lancashire and Yorkshire Ry. Co., (1865) 8 H. & C. 594, 81 L. J. Ex. 48, 12 L. T. 391	172
Nicholson v. Motuney, (1812), 15 Eas. 384, 18 R. R. 501	288
Nicholson v. Piper, [1907] A. C. 215, 76 L. J. K. B. 856, 97 L. T. 119, 23 T. L. R. 620	563

Table of Cases

lvii

	PAGE
Nicoll v. Grasses (1864), 17 C. B. N. S. 27, 33 L. J. C. 17, 259; 10 Jur. (N. S.) 919; 10 L. T. 531, 12 W. R. 961	268
Nicolson v. MacAndrew, (1888), 15 R. 854, 25 Sc. L. R. 607	188
Nield v. L. & N.-W. Ry. Co., (1874) L. R. 10 Ex. 4, 44 L. J. Ex. 15, 23 W. R. 60	69
Nimmo & Co. v. Fisher, [1907] S. C. 890, 41 Sc. L. R. 641	615
Nitro-Phosphate and Udam's Chemical Manure Co. v. London and St. Katharine Docks Co., (1878), 9 Ch. D. 508, 39 L. T. 433, 27 W. R. 267	16, 65
Noel v. Reddish Foundry Co., [1896] 1 Q. B. 459, 65 L. J. Q. B. 830, 74 L. T. 196, 44 W. R. 107, 12 T. L. R. 248	105, 239, 240, 241, 521, 573
Nordenfellt v. Maxim Nordenfellt Guns, & Co., 1894 A. P. 535, 61 L. J. Ch. 908, 31 R. L. 71 L. T. 489, 10 T. L. R. 636	205
Northheimer v. Alexander, (1891), 19 Can. S. C. R. 248	168, 188
Norman & Burt v. Walder, 1901 2 K. B. 27, 71 L. J. K. B. 461, 90 L. T. 511, 52 L. R. 102, 68 J. P. 101, 30 T. L. R. 127, 6 W. C. C. 124	375
North v. Smith, (1861), 10 C. B. N. S. 512, 4 L. J. P. 407	146
North British Ry. Co. v. Wood (1891), 18 R. (H. L.) 27, 28 Sc. L. R. 130	118
North Eastern Ry. Co. v. Wainless, (1871), L. R. 7 H. L. 12, 43 L. J. Q. B. 185, 30 L. T. 273, 23 W. R. 561	81
North Metropolitan Tramways Co. v. London County Council, [1898] 2 Lh. 145, 67 L. J. Ch. 119, 78 L. T. 711, 46 W. R. 551, 62 J. P. 488, 14 T. L. R. 414	247
Northern Employers' Mutual Indemnity Co. v. Kniveton, see Kniveton v. N. E. M. I. Co.	
Nordley v. Trevillion, (1903), 18 F. L. R. 618, 7 Com. Cw. 201	11
Nowlan v. Abbot, (1835), 2 C. M. & B. 51, 11 L. J. Ex. 135, 5 Tyr. 709, 1 Gale 72	268
Nugent v. Smith, (1875), 1 C. P. D. 121, 15 L. J. C. P. 607, 34 L. T. 827, 25 W. R. 117	16, 51, 66
Nunn v. Tyson, [1901] 2 K. B. 187, 70 L. J. K. B. 854, 85 L. T. 123, 50 W. R. 16, 17 T. L. R. 621	597
Nurse v. Yeworth, (1871) 3 Swan (App.), 608, Rep. Tem. Planch. 135, 2 Mod. 8, 23 Eng. Rep. 85, 30 Ch. 99	104
Oakes v. Monkland Iron Co., (1881) 11 R. 379, 21 Sc. L. R. 407	267, 452
O'Byrne v. Burn, (1854), 16 Dunlop, 1025, 20 Sc. Jur. 579	40
O'Connor v. Hamilton Bridge Co., (1898), 25 Ont. R. 12	180
O'Donovan and Cameron, Swan, In re, [1901] 2 L. R. 633, 74 D. L. T. 169	101, 475
Offin v. Rochford Rural D. C., [1906] 1 Lh. 342, 75 L. J. Ch. 348; 94 L. T. 669, 54 W. R. 244, 70 J. P. 97, 1 L. R. R. 595	247
Ogden v. Rohnmens, (1863), 8 F. & F. 751	28, 33, 169
Ogdens, Ltd. v. Nelson, [1905] A. C. 103, 74 L. J. K. B. 433, 92 L. T. 478, 51 W. R. 197, 21 T. L. R. 339	11
Ogle v. Morgan, (1852), 1 Do. G. M. & G. 359, 16 Jur. 277; 42 Eng. Rep. 590	268

	PAGE
O'Hanlon v. Dundalk, & Co., Steam Packet Co., (1899), 38 Ir. L. T.	
36	451
O'Hara v. Cadzow Coal Co., Ltd., (1909) 5 F. 499, 40 Sc. L. R. 355;	
10 Sc. L. T. 617	411
O'Keefe v. Lovatt, (1901), 18 T. L. R. 87, 4 W. C. C. 109, W. N.	
923	511, 698
Oldfield v. Furness, Withy & Co., (1898), 9 T. L. R. 515; 58 J. P.	
102	49
Oliver v. Nautilus Steam Shipping Co., Ltd., (1908) 2 K. B. 639, 72	
L. J. K. B. 857, 80 L. T. 115, 52 W. R. 200, 9 Asp. M. C.	
416, 5 W. C. C. 65, 19 T. L. R. 607	616, 689
O'Neil v. Everett, (1891), 61 L. J. Q. B. 453, 66 L. T. 396, 56 L. P.	
612, 8 T. L. R. 126, 7 Asp. M. C. 661	172
O'Neill v. Motherwell, [1907] 8 C. 1076, 11 Sc. L. R. 764	614
Ormond, or Ormerod, <i>Ex parte</i> , (1844), 1 Dow. & L. 825, 1 New Rep.	
Cas. 38, 13 L. J. M. C. 78, 8 Int. 195	275
Ormond v. Holland, (1858), 13 B. & E. 102	34
"Orwell," <i>The</i> , (1884), 13 P. D. 80, 57 L. J. P. 61, 59 L. T. 112.	
36 W. R. 709, 6 Asp. M. C. 309	119
Osborn v. Gillett, (1878), L. R. 8 Ex. 88, 42 L. L. Ex. 53; 28 L. T.	
197, 21 W. R. 409	102, 105
Osborn v. Vickers, Sons & Maxim, Ltd., (1900) 2 Q. B. 91, 69 L. J.	
Q. B. 606; 82 L. T. 491, 16 T. L. R. 743, 2 W. C. C. 190	582,
605, 660, 678, 679	
Osborne v. Jackson, (1848), 11 Q. B. D. 619, 14 L. T. 612	201, 212
Osmond v. Campbell & Harrison, [1905] 2 K. B. 452, 75 L. J. K. B.	
1, 91 L. T. 721, 54 W. R. 117, 23 T. L. R. 1	519
O'Sullivan v. O'Connor, (1888), 22 L. R. 11, 467	46
Orvington v. M'Wheat, (1864), 2 Macph. 1066	161, 177, 178
Owner v. Hooper, (1901), 89 T. T. 110, 65 L. P. 106, 19 T. L. R. 601	294
Pago v. Buttwell, [1908] 2 K. B. 778	308, 424, 600, 600
Paley v. Garnett, (1845), 16 Q. B. D. 52, 14 W. R. 295, 50 L. P. 469	175, 186
Palmer v. Wick and Pulteney Town Steam Shipping Co., (1894)	
A. C. 318, 71 L. T. 163, 10 T. L. R. 511, 6 R. 245	65, 154, 696
Parker v. Mayer, 41 Sc. L. R. 191, see Mayer v. Park	
Park Gate Iron Co. v. Coates, (1870), L. R. 5 C. P. 694, 41 L. J. C. P.	
317; 22 L. T. 658, 18 W. R. 928	214
Parker v. Bristol and Exeter Ry. Co. (1851), 6 Ex. 184, 2 L. M. & P.	
186, 20 L. J. Ex. 112, 15 Int. 309	257
Parker v. London County Council, [1904] 2 K. B. 501, 71 L. J. K. B.	
561, 90 L. T. 415, 52 W. R. 176, 68 J. P. 249, 2 L. G. R. 632,	
20 T. L. R. 271	246
Parker v. Wm. Dixon, Ltd., (1902), 39 Sc. L. R. 663	569
Parry v. Smith, (1879), 4 C. P. D. 325; 48 L. J. C. P. 731, 41 L. T.	
98, 27 W. R. 801	59
Partington, <i>Ex parte</i> , (1844), 6 Q. B. 649	361
Patent Safety Gun Cotton Co. v. Wilson, (1880), 49 L. J. Q. B. 713	57
Peterson v. Blackburn Corporation, (1892), 9 T. L. R. 55	55

Table of Ca

lix

	PAGE
<i>Paterson v. Fleming</i> , (1904), 23 N. Z. L. R. 676	141
<i>Paterson v. Lockhart</i> , (1905), 7 F. 954; 42 So. L. R. 755; 13 Sc. L. T. 298	447
<i>Paterson v. Wallace</i> , (1854), 1 Macq. (H. L. Sc.) 748, 1 <i>Paterson</i> 389	22, 33, 74
<i>Paton v. Niddrie & Benhar Coal Co.</i> , (1885), 12 R. 53 ² ; 22 Sc. L. R. 345	259
<i>Pattinson & Sons v. Stevenson</i> , (1900), 2 W. C. C. 156, 100 L. T. newspaper, 106	552, 534, 556, 538
<i>Pattinson v. White & Co.</i> , (1901), 20 T. L. R. 775	499
<i>Patton v. Texas, &c., Ry. Co.</i> , (1901), 179 L. S. 658	74
<i>Paul v. Travellers' Insurance Co.</i> , (1889), 4 Am. St. R. 758	16
<i>Pearce v. L. & S.-W. Ry. Co.</i> , (1900), 2 Q. B. 100, 69 L. J. Q. B. 681, 82 L. T. 187, 18 W. R. 529, 16 F. L. R. 496, 2 W. C. C. 47	486, 487, 498
<i>Pearson v. Cox</i> , (1877), 2 C. P. D. 369, 36 L. T. 495	71, 77
<i>Pearson v. Dublin Corporation</i> , (1907), 21 R. 27, 1907, A. C. 151, 77 L. J. P. C. 1, 97 L. T. 645	346
<i>Pedgrift v. Chevalier</i> , (1860), 8 Q. B. N. S. 240, 246, 29 L. J. M. C. 225, 6 Jur. (N. S.) 1341, 8 W. R. 500	678
<i>Peebles v. Oswaldtwistle Urban District Council</i> , (1896), 2 Q. B. 159, 65 L. J. Q. B. 491, 71 L. T. 721, 44 W. R. 511, 60 J. P. 516	101, 470, 477
<i>Pogram v. Dixon</i> , (1886), 55 L. J. Q. B. 147, 51 J. P. 198, 2 T. L. R. 801	165
<i>Penn v. Spiers & Pond, Ltd.</i> , (1908), 1 K. B. 766, 77 L. J. K. B. 512, 98 L. T. 541	394, 528
<i>Penny v. Wimbledon Urban District Council</i> , (1899), 2 Q. B. 72, 68 L. J. Q. B. 704, 80 L. T. 615, 47 W. R. 565, 63 J. P. 406, 15 T. L. R. 818	61, 287
<i>Pennsylvania Co. v. Langendorf</i> , (1891), 20 Am. St. R. 551	92
<i>Perival v. Garner</i> , (1900), 2 Q. B. 406, 69 L. T. Q. B. 824, 61 J. P. 500, 16 T. L. R. 396, 2 W. C. C. 99	492, 511
<i>Perival v. Hughes</i> , see <i>Hughes v. Perival</i>	
<i>Peikins v. Stodd</i> , (1907), 21 T. L. R. 191	140
<i>Perry v. Brass</i> , (1889), 5 F. L. R. 251	183
<i>Perry v. Clements</i> , (1900), 17 T. L. R. 525, 49 W. R. 669, 8 W. C. C. 56	607, 611
<i>Perry v. Wright</i> , (1908), 1 K. B. 141, 77 L. J. K. B. 246, 98 L. T. 827, 24 T. L. R. 186	521, 526, 529, 546, 547, 590, 563
" <i>Petrol</i> ," <i>The</i> , 1893 P. 320, 62 L. J. P. 92, 1 R. 651, 70 L. T. 417, 7 Asp. M. C. 494	14
<i>Phillips v. Alhambra Palace Co.</i> , 1901 4 K. B. 59, 71 L. J. K. B. 26, 83 L. T. 431, 49 W. R. 224, 17 T. L. R. 40	10
<i>Phillips v. Homfray</i> , (1888), 24 Ch. D. 489, 52 L. J. Ch. 893, 49 L. T. 5, 32 W. R. 6	101
<i>Phillips v. L. & S.-W. Ry. Co.</i> , (1879), 5 Q. B. D. 78, 41 L. T. 121, 28 W. R. 107, 5 C. P. D. 280, 49 L. J. C. P. 238, 42 L. T. 6, 44 J. P. 217	114, 290, 292
<i>Piers v. Lovatt</i> , cited in <i>Rugg's Workman's Compensation</i> (7th edit.), 82	265
<i>Pike v. London General Omnibus Co.</i> , (1891), 8 T. L. R. 164	97

	Page
<i>Pisani v. Lawson</i> , (1899), 6 Bing N. C. 90; 8 Scott, 180; 6 Dowling, 57, 9 L. J. C. P. 12, 3 Jur 1153	103
<i>Polley v. Fordham</i> , [1904] 2 K. B. 845, 73 L. J. K. B. 687, 90 L. T. 755, 53 W. R. 48, 188, 68 J. P. 821, 20 T. L. R. 485	247
<i>Pomfret v. L. & Y. Ry. Co.</i> , [1903] 2 K. B. 718, 72 L. J. K. B. 729; 89 L. T. 176, 52 W. R. 66, 19 T. L. R. 649, 5 W. C. C. 22	98, 364, 369
<i>Pomphrey v. Southwark Press</i> , [1901] 1 K. B. 86, 70 L. J. Q. B. 48, 89 L. T. 468, 65 J. P. 148, 17 T. L. R. 51, 3 W. C. C. 191	595, 598, 511, 573, 575
<i>Porton v. Central (Unemployed) Body for London</i> , 25 T. L. R. 102	448
<i>Potter v. Faulkner</i> , (1861), 1 B. & S. 800, 31 L. J. Q. B. 30, 5 L. T. 455, 10 W. R. 93, 8 Jur (N.S.) 259	16, 59
<i>Potter v. Great Western Colliery Co.</i> , (1891), 10 T. L. R. 780	252
<i>Potter v. Metropolitan District Ry. Co.</i> , (1874), 30 L. T. 765, (1875), 32 L. T. 36	115
<i>Potts v. Tunkett</i> , (1859), 9 L. C. L. R. 290	22
<i>Potts v. Port Charles Dock and Ry. Co.</i> , (1860), 2 L. T. 283, 8 W. R. 524	21
<i>Poulton v. L. & S.-W. Ry. Co.</i> , (1867), L. R. 2 Q. B. 531, 8 B. & S. 616, 86 L. J. Q. B. 204, 17 L. T. 11, 16 W. R. 309	152
<i>Powell v. Brown</i> , (1899) 1 Q. B. 157, 68 L. J. Q. B. 151, 479 L. T. 631, 47 W. R. 145, 15 T. L. R. 65, 1 W. C. C. 41	490, 496, 497, 501, 502
<i>Powell Duffryn Steam Coal Co. v. Edwards</i> , (1900), <i>The Times</i> newspaper, 23rd July	559, 564
<i>Powell v. Fall</i> , (1880), 5 Q. B. D. 507, 49 L. J. Q. B. 128, 13 L. T. 562	235
<i>Powell v. Kempton Park Racecourse Co.</i> , 1899, 1 C. 143, 68 L. J. Q. B. 392, 80 L. T. 538, 47 W. R. 555, 63 J. P. 260, 15 T. L. R. 266	123
<i>Powell v. Lanarkshire Steel Co.</i> , (1904), 6 L. T. 1039, 42 Sc. L. R. 231, 12 Sc. L. T. 656	188
<i>Powell v. DeHynn & Bradshaw</i> , [1902] 2 L. R. 154	71, 76
<i>Powell v. Main Colliery Co., Ltd.</i> , [1900] 1 A. C. 366, 69 L. J. Q. B. 758, 88 L. T. 85, 49 W. R. 49, 65 J. P. 100, 16 T. L. R. 166, 2 W. C. C. 29	426, 597, 598, 600, 607, 608, 610, 612, 614, 616, 669
<i>Præd v. Graham</i> , (1889), 24 Q. B. D. 53, 59 L. J. Q. B. 230, 38 W. R. 103	291
<i>Pratt v. Broxburn Oil Co.</i> , [1907] 8 C. 581, 11 Sc. L. R. 408	411, 412
<i>Pratt v. Weymouth Inhabitants</i> , (1888), 147 Mass. 215, 9 Am. St. R. 691	162
<i>Prendible v. Connecticut River Manufacturing Co.</i> , (1861), 160 Mass. 131	170
<i>Preston Banking Co. v. Wylliam Gibson & Sons</i> , 1895, 1 Ch. 141, 64 L. J. Ch. 190, 71 L. T. 708, 43 W. R. 231, 12 R. 51	638
<i>Prevost v. Prevost v. Gatti</i> , (1888), 58 L. T. 702, 36 W. R. 670, 52 J. P. 616, 4 T. L. R. 487	243, 263
<i>Price v. Marsden</i> , (1899) 1 Q. B. 498, (8 L. J. Q. B. 307, 80 L. T. 15, 47 W. R. 274, 15 T. L. R. 184, 1 W. C. C. 108	521
<i>Priddy v. Dick</i> , (1857), 19 Dunlop 287, 29 Sc. Fin. 142	107
<i>Price v. Cochrane</i> , (1902), 7 April, (unreported)	430
<i>Priestley v. Fowler</i> , (1837), 3 M. & W. 1, 7 L. J. Lx. 42, M. & H. 805; 1 Jur. 987	21

Table of Cases

lxi

	PAGE
Printing and Numerical Registering Co. v. Sampson, (1875), L. R. 19 Eq. 462, 44 L. J. Ch. 703, 33 L. T. 851, 23 W. R. 491	205
Pritchard v. Lang, (1889), 5 T. L. R. 639	171
Prosser v. Edmonds, (1815), 1 Y. & C. 481	108
Prosser v. Lancashire and Yorkshire Accident Insurance Co., (1890), 6 T. L. R. 285	117
Pryce, <i>In re</i> , Bouslaug, <i>Ex parte</i> , (1877), 4 Ch. D. 685, 36 L. T. 117, 25 W. R. 432	378
Pryce v. Bangkok Navigation Co., (1902), 1 K. B. 231, 51 L. J. K. B. 192, 85 L. T. 457, 30 W. R. 197, 60 J. P. 198, 18 T. L. R. 54, 4 W. C. C. 115	465, 474
Pugh v. London, Brighton and South Coast Ry. Co., (1896), 21 Q. B. 248, 65 L. T. Q. B. 721, 71 L. T. 721, 11 W. R. 627, 12 T. L. R. 448	16
Pulling v. G. P. Ry. Co., (1882), 9 Q. B. D. 110, 50 L. J. Q. B. 451, 30 W. R. 708, 16 J. P. 615	115
Pumphreys & Co. Ltd. v. Cavaye, (1901), 5 T. 263, 4086 L. R. 724, 11 Sc. L. T. 151	556
Pyves v. Stone, (1900), 2 P. 887, 35 Sc. L. R. 696	512
Pyne v. G. N. Ry. Co., (1862), 2 B. & S. 779, (1861), 4 B. & S. 396, 32 L. T. Q. B. 377, 8 L. T. 731, 11 W. R. 922, 10 Lm. (S.S.) 199	109, 111
Quarman v. Burnett, (1819) 6 M. & W. 190, 9 L. T. Ex. 308, 1 Jan. 1909	140, 146
Queen v. Clarke, (1906), 21 R. 135	165, 466
Queen, The v. Hotel, (1861), 4 B. & S. 959, 11 L. T. M. C. 100, 10 Jan. (S.S.) 798, 12 W. R. 106	637, 654
Queen, The v. City of London Court (Judge of), (1885), 14 Q. B. D. 965, 54 L. J. Q. B. 110, 52 L. T. 417, 11 W. R. 500, 1 P. L. R. 434	259
Queen, The v. Hutchings, (1881), 6 Q. B. D. 300, 50 L. J. M. C. 35, 11 L. T. 364, 29 W. R. 721, 15 J. P. 501	417
Queen, The v. Kent Justices, (1871), L. R. 8 Q. B. 365, 42 L. J. M. C. 112, 21 W. R. 685	492
Queen, The v. Mathub, & Co., (1871), 21 Southeyland's W. R. Crim. (India) 11	78
Queen, The v. Oxfordshire County Court (Judge of), (1891), 21 Q. B. 440, 61 L. J. Q. B. 689, 50 L. T. 874, 12 W. R. 601, 58 J. P. 752, 10 R. 781, 10 T. L. R. 517	610
Queen, The v. Sheffield (Mayor of), (1871), L. R. 6 Q. B. 652, 40 L. J. Q. B. 237, 21 L. T. 679, 19 W. R. 1159	246
Queen, The v. Shropshire Justices, (1894), 4 A. & L. 373	392
Queen, The v. Worth, (1851), 21 L. J. M. C. 14, 21 W. C. C. 383, T. & M. 630, 15 Jan. 1115, 5 Pox. C. C. 382	268
Quinn v. Brown, (1906), 8 P. 856, 43 Sc. L. R. 613	424
Quinn v. Leatham, (1801), A. C. 495, 70 L. T. P. C. 76, 85 L. T. 289, 50 W. R. 139, 65 J. P. 708, 17 P. L. R. 749	355
R. v. Almon, (1750), 20 How. St. Tr. 803	156
R. v. Ashton, (1754), Nayer, 139	449

	PAGE
R. v. Boteler, (1864), 4 B & S. 959; 33 L. J. M. C. 101; 10 Jur. (N.S.) 798; 12 W. P. 466	687, 684
R. v. City of London Court, (Judge of), (1887), 14 Q. B. D. 905; 54 L. J. Q. B. 330, 52 L. T. 537, 33 W. R. 700, 1 T. L. R. 434 ..	253
R. v. Dixon, (1814) 3 M & S 11; 4 Camp 12, 15 R. R. 981	155
R. v. Hames, (1817), 4 C & K 369	64
R. v. Hampden, (1637), 3 How. St. Tr. 827	295
R. v. Haslingfield, (1811), 2 M & S 554, 15 R. R. 370	71
R. v. Hutchings, (1881), 6 Q. B. D. 300, 50 L. J. M. C. 47, 48 L. T. 364, 29 W. R. 724, 45 J. P. 504	417
R. v. Irvinghoe, (1719), 1 Stra. 90	478
R. v. Kent Justices, (1873), 1 L. R. 8 Q. B. 305, 42 L. J. M. C. 112, 21 W. R. 637	432
R. v. Louth Justices, [1900] 2 L. R. 711, 34 L. L. T. 13	252
R. v. Madhub, &c., (1873), 21 Sutherland's W. R. Criminal (India), 13	78
R. v. Owen, [1907] 2 K. B. 436, 71 L. J. K. B. 770, 87 L. T. 298, 51 W. R. 168, 18 T. L. R. 701, 4 W. C. C. 150	673
R. v. Oxfordshire County Court (Judge of), [1891] 2 Q. B. 440, 63 L. J. Q. B. 689, 70 L. T. 871, 12 W. R. 601, 54 L. P. 752, 10 R. 381; 10 T. L. R. 117	630
R. v. Pearce or Pierce, (1880), 5 Q. B. D. 386, 49 L. J. M. C. 81, 28 W. R. 568, 41 J. P. 216	477
R. v. Sheffield Corporation, (1871), L. R. 6 Q. B. 651, 10 L. J. Q. B. 247, 24 L. T. 679, 19 W. R. 1159	346
R. v. Shropshire Justices, (1838), 8 A & F 174	392
R. v. Sterling, (1755), Saver, 174	119
R. v. Wakefield, (1758), 1 Burr. 185, 2 Ld. Ken 164	477
R. v. Walker, (1812), 1 C & P 320	91
R. v. Wortley, (1851), 21 L. J. M. C. 11, 2 Den. C. C. 431, 7 A. M. 636; 15 Jur. 1147, 5 Cox C. C. 182	258
Race v. Harrison, (1893), 10 T. L. R. 93	173, 177
Rae v. Milne & Sons, (1890), 21 R. 165, 34 Sc. L. R. 149	168
Radley v. L. & N.-W. Ry. Co., (1875), 1 App. Cas. 751, 40 L. J. P. 673, 35 L. T. 607, 25 W. R. 147	86, 89
Railroad Co. v. Fort, (1873), 17 Wall. (U. S.) 753	40, 238
Railway Sleepers Supply Co., In re, (1895), 29 Ch. D. 204, 54 L. J. Ch. 720, 52 L. T. 731, 33 W. R. 595, 1 T. L. R. 399	392
Ralough v. Gooch, [1898] 1 Ch. 73, 67 L. J. Ch. 59, 77 L. T. 129, 46 W. R. 90, 14 T. L. R. 36	282
Ralston v. Rowat, (1893), 1 C. L. J. 121	107
Rankine v. Alloa Coal Co., (1904), 6 F. 375, 11 Sc. L. R. 306, 11 Sc. L. T. 670	605
Raphael v. Bank of England, (1856), 17 C. B. 161, 25 L. J. C. P. 88, 4 W. R. 10	195
Ratcliffe v. Barnard, (1871), L. R. 6 Ch. 625, 40 L. J. Ch. 777, 19 W. R. 764	49
Rathbone v. Ross, (1891), 35 Sol. J. 204	260
Ray v. Wallis, (1856), 51 J. P. 519, 9 T. L. R. 777	201, 209, 206
Rayner v. Mitchell, (1877), 2 C. P. D. 857; 25 W. R. 693	149
Rea v. Balmain New Ferry Co., (1896), 17 N. S. W. R. (L.) 92	84

Table of Cases

lxiii.

	PAGE
<i>Read v. G. E. Ry. Co.</i> , (1886), L. R. 3 Q. B. 555; 9 B. & S. 714; 87 L. J. Q. B. 278, 18 L. T. 82, 16 W. R. 1040 ...	103, 116, 531
<i>Reed v. Great Western Ry. Co.</i> , (1908), 25 T. L. R. 86 ...	373, 383
<i>Reed v. Harvey</i> , (1880), 5 Q. B. D. 184, 49 L. J. Q. B. 205; 42 L. T. 511, 28 W. R. 423, 44 L. P. 474 ...	265
<i>Reedie v. L. & N. W. Ry. Co.</i> , (1849), 4 Ex. 244, 20 L. J. Ex. 65, 6 Ital. Cas. 184 ...	75, 287
<i>Reeks v. Kynoch, Ltd.</i> , (1901), 18 T. L. R. 34, 30 W. R. 111, 4 W. C. C. 14 ...	386, 408, 412
<i>Rees v. Penitkyber Navigation Co.</i> , 131, (1808) 1 K. B. 250, 72 L. J. K. B. 85, 87 L. T. 661, 51 W. R. 247, 67 J. P. 211, 10 T. L. R. 113, 5 W. C. C. 117 ...	465
<i>Rees v. Powell Duffryn Steam Coal Co.</i> , (1900), 64 J. P. 164, 4 W. C. C. 17 ...	405
<i>Rees v. Thomas</i> , (1899) 1 Q. B. 1015, 68 L. J. Q. B. 530, 80 L. T. 578, 47 W. R. 504, 15 T. L. R. 301, 1 W. C. C. 9 ...	92, 377, 389
<i>Reeve v. Gibson</i> , 1891 1 Q. B. 652, 60 L. J. Q. B. 451, 19 W. R. 420 ...	247
<i>Reeves v. Heame</i> , (1886), 1 M. & W. 321, 51 L. J. Ex. 156, 2 Gale 4 ...	617
<i>Reid v. Baxter</i> , (1840) 7 Cl. & F. 261 ...	432
<i>Reid v. Bishland School Board</i> , (1901) 17 T. L. R. 626 ...	240
<i>Reid v. Fleming</i> , (1901), 3 F. 1000, 18 Sc. L. R. 720 ...	512
<i>Rendall v. Hills Dry Dock and Engineering Co., Ltd.</i> , (1900) 2 Q. B. 245, 69 L. J. Q. B. 554, 82 L. T. 521, 18 W. R. 530, 64 J. P. 451, 16 T. L. R. 368, 2 W. C. C. 40 ...	615, 616, 680
<i>Reynolds v. Accidental Insurance Co.</i> , (1870), 22 L. T. 820, 18 W. R. 1141 ...	16
<i>Reynolds v. Holloway</i> , (1898) 14 T. L. R. 551 ...	184, 211
<i>Reynolds v. Thomas Tilling, Ltd.</i> , (1903), 19 T. L. R. 599, 20 T. L. R. 57 ...	86, 98
<i>Rhodes v. Forwood</i> , (1876), 1 App. Cas. 256; 47 L. J. Ex. 396, 94 L. T. 890, 21 W. R. 1078 ...	11
<i>Rhodes v. Groun Railroad Co.</i> , (1890), 20 Am. St. R. 302 ...	98
<i>Richards v. West Middlesex Waterworks Co.</i> , (1885), 15 Q. B. D. 660, 54 L. J. Q. B. 551, 31 W. R. 902, 49 L. P. 631 ...	147
<i>Richardson v. G. E. Ry. Co.</i> , (1876), 1 C. P. D. 312, 35 L. T. 351, 24 W. R. 907 ...	49
<i>Richardson v. Mellish</i> , (1821), 2 Bing. 229, 1 Moore, C. P. 435, 1 C. & P. 241, 1 L. J. (O. S.) C. P. 265, 11 A. V. 66, 27 R. R. 683 ...	295
<i>Rideal v. G. W. Ry. Co.</i> , (1879), 1 F. & F. 706 ...	116
<i>Rigby v. Cox</i> , (1904), 1 K. B. 358, 73 L. J. K. B. 80, 80 L. T. 717, 52 W. R. 195, 68 J. P. 195, 20 T. L. R. 136, 6 W. C. C. 158 ...	586, 639, 640
<i>Rigby v. Cox</i> (No. 2), (1904) 2 K. B. 208, 73 L. J. K. B. 690; 91 L. T. 72, 68 J. P. 385, 20 T. L. R. 461, 6 W. C. C. 161 ...	586, 646
<i>Rigby v. Hewitt</i> , (1860), 5 Ex. 240, 19 L. J. Ex. 291 ...	88
<i>Riley v. Baxendale</i> , (1861), 6 H. & N. 486, 30 L. J. Ex. 309; 9 W. R. 347 ...	28
<i>Riley v. Warden</i> , (1848), 2 Ex. 59, 18 L. J. Ex. 120 ...	208, 272, 278
<i>Rimmer v. Premier Gas Engine Co.</i> , (1907), 23 T. L. R. 610 ...	507
<i>Riou v. Rockport Granite Co.</i> , (1898), 171 Mass. 102. ...	206

	PAGE
River Wear Commissioners v Adamson, (1877), 3 A. C. 743; 47 L. J. Q. B. 193, 37 L. T. 543, 20 W. R. 217	64
Ravett-Carnac, <i>In re</i> , Summonds, <i>Ex parte</i> , see Summonds, <i>Ex parte</i> .	
Robb v. Bulloch, Lade & Co., (1892), 19 R. 971, 29 Sc. L. R. 832	24
Roberts v. Eastern Counties Ry. Co., (1859), 1 F. & F. 460	115
Roberts v. Sheffield Corporation, see R. v. Sheffield Corporation.	
Roberts v. Smith, (1857), 2 H. & N. 213, 26 L. J. Ex. 319, 3 Jur. (N. S.) 409, 5 W. R. 581	23
Roberts v. Woodward, (1890), 25 Q. B. D. 419, 59 L. J. M. C. 129, 63 L. T. 200, 38 W. R. 770, 55 J. P. 116, 17 Cox C. C. 189	156
Robertson v. Henderson, (1904), 6 F. 770, 11 Sc. L. R. 597, 12 Sc. L. T. 111	392
Robertson v. Russell, (1885), 12 R. 611, 22 Sc. L. R. 104	137
Robinson v. Barton Eccles Local Board, (1884), 8 App. Cas. 798, 53 L. J. Ch. 226, 50 L. T. 57, 32 W. R. 219, 18 J. P. 276	452
Robinson v. Canadian Pacific Ry. Co., 1892, 5 C. 181, 61 L. J. P. C. 79; 67 L. T. 505, 4 T. L. R. 722	132
Robinson v. Reid's Trustees, (1900), 2 F. 924, 17 Sc. L. R. 718	70
Robinson v. Watson, (1892), 20 R. 114, 30 Sc. L. R. 114	187
Robinson v. W. H. Smith & Co., (1901), 17 T. L. R. 123	40 99
Robson v. Drummond, (1891), 2 B. & M. 303, 9 L. J. (N. S.) K. B. 187	10
Robson v. North-Eastern Ry. Co., (1875), L. R. 101 D. 271 (1875), 2 Q. B. D. 85, 46 L. J. Q. B. 50, 15 L. T. 515, 25 W. R. 118	79
Roe v. Buxtonhead Ry. Co., (1851), 7 Ex. 16, 21 L. J. Ex. 9, 6 Rail. Cas. 795	142, 143
Roo v. Frapp, (1899), 1 F. 1017, 36 Sc. L. R. 782	512
Roebuck v. Norwegian Titanic Co., (1884), 1 T. L. R. 117	92
Rogers v. Cardiff Corporation, 1905, 2 K. B. 812, 75 L. J. K. B. 22, 93 L. T. 683, 51 W. R. 35, 70 J. P. 9, 22 T. L. R. 9, 4 L. J. R. 49, 8 W. C. C. 51	499
Rogers v. Hadley, (1861), 2 H. & C. 227, 32 L. J. Ex. 211, 9 Jur. (N. S.) 898, 9 L. T. 292, 11 W. R. 1074	358, 611
Rohr v. Metropolitan Ry. Co., (1889), 7 T. L. R. 2	118, 372
Rolls v. Miller, (1884), 27 Ch. D. 71, 51 L. J. Ch. 682, 50 L. T. 597, 32 W. R. 800, 18 J. P. 518	459
Romney Marsh (Bailiffs of) v. Trinity House, (1870), L. R. 5 Ex. 204, (1872), L. R. 7 Ex. 217, 41 L. J. Ex. 106, 20 W. R. 952	69
Rooney v. Allans, (1883), 10 R. 1234, 20 Sc. L. R. 812	82, 96, 179
Roper v. Greenwood, (1900), 83 L. T. 471, 3 W. C. C. 23	404
Ross v. Keith, (1888), 16 R. 86, 26 Sc. L. R. 55	94
Rosenqvist v. Bowring & Co., Ltd., 1908, 2 K. B. 108, 77 L. J. K. B. 545, 98 L. T. 773, 21 T. L. R. 501	599
Rothwell v. Davie, (1901), 19 T. L. R. 428	577
Rourke v. White Moss Colliery Co., (1876), 1 C. P. D. 556; (1877), 2 C. P. D. 205, 46 L. J. C. P. 283, 36 L. T. 49, 25 V. R. 263	44, 484
Rouse v. Dixon, 1904, 2 K. B. 628; 73 L. J. K. B. 662, 91 L. T. 436; 68 J. P. 406, 20 T. L. R. 558, 5 W. C. C. 44	421, 424
Rouillon v. Rouillon, (1880), 14 Ch. D. 851, 49 L. J. Ch. 338, 42 L. T. 679, 28 W. R. 623, 44 J. P. 663	295

Table of Cases

lxv

	PAGE
Rowbotham v Wilson, (1857), 8 F. & B. 121, 27 L. J. Q. B. 81; 3 Jun. (N. S.) 1297, 5 W. R. 420, <i>affirmed</i> , (1863), 5 L. J. Q. 319, 39 L. J. Q. B. 497, 6 Jur. (N. S.) 965, 2 L. T. 622 ...	36, 395
Rowland v. Wright, (1904), 21 T. L. R. 452 ..	391
Rowlands v. Do Vecchi, (1882), 1 C. & E. 10 ..	261
Rowley v. L. & N.-W. Ry. Co., (1873), L. R. 8 Lk. 224, 42 L. J. Ex. 153, 29 L. T. 140, 21 W. R. 459 ..	113, 556
"Ruby," The (No. 2), (1898), P. 39, 67 L. J. P. 28, 58 L. T. 215, 46 W. R. 647, 14 T. L. R. 141 ..	207, 452
Rumboll v. Gunner Colliery Co., (1899), 80 L. T. 42, 63 J. P. 132, 1 W. C. C. 24 ..	402, 638
Rumsey v. North Eastern Ry. Co., (1864), 14 C. B. N. S. 611, 32 L. J. C. P. 214, 30 Jun. (N. S.) 204, 8 L. T. 606, 11 W. R. 411 ..	295
Rushbrook v. Grimsby Palace Theatre, (1904), 90 L. T. 18, 24 T. L. R. 617 ..	272
Russell v. Holme, (1900), 108 Law Times newspaper, 353, 2 W. C. C. 153 ..	567
Russell v. McKinstry, (1900), 2 F. 1412, 87 Sc. L. R. 931 ..	320, 327
Russell v. M'Leish & M'Taggart, (1891), 35 Sc. L. R. 818 ..	45, 183
Ryalls v. Mechanics' Mills, (1849), 190 Mass. 180 ..	182
Ryder v. Wombwell, (1868), L. R. 4 Ex. 32, 38 L. J. Ex. 8, 19 L. T. 491, 15 W. R. 167 ..	78
Rylands v. Fletcher, <i>see</i> Fletcher v. Rylands	

Sadler v. Henlock, (1855), 1 L. & B. 370, 8 C. L. R. 700, 23 L. J. Q. B. 138, 1 Jun. (N. S.) 677, 3 W. R. 141 ..	10, 149, 277, 285, 447
"St Cloud," The, (1863), Browning and Lush J., 8 L. T. 54 ..	397
St. Lawrence and Ottawa Railroad Co. v. Lett, (1884), 11 Can. S. C. R. 422 ..	109
Sandeman v. Scott (1860), L. R. 2 Q. B. 86, 8 B. & S. 50, 36 L. J. Q. B. 58, 15 L. T. 608, 15 W. R. 277 ..	185
Sanders v. Barker, (1890), 6 T. L. R. 321 ..	165
Sanderson v. Sanderson, (1877), 36 L. T. 817 ..	108, 242
Satch v. Blackburn, (1830), 1 C. & P. 297, 11 A. & M. 505 ..	50
Saunders v. Judge, (1795), 2 H. Bl. 509, 3 R. R. 492 ..	264
Saxton v. Hawkesworth, (1872), 20 L. T. 831 ..	247
Scaramanga v. Stamp, (1880), 5 C. P. D. 295, 49 L. J. C. P. 674, 42 L. T. 840, 24 W. R. 693, 1 Asp. M. C. 245 ..	92
Searr v. General Accident Assurance Corporation, Ltd., (1905), 1 K. B. 385, 74 L. J. K. B. 237, 92 L. T. 124, 21 T. L. R. 178 ..	17
Schmidt v. Kansas City Distillery Co., (1886), 59 Am. R. 16 ..	97
Schneider v. Norris, (1814), 2 M. & S. 286, 15 R. R. 250 ..	482
Schofield v. Orrell Colliery Co., (1908), Times Newspaper, 30th Nov. Schofield v. Earl of Lonsborough, (1896) A. C. 514, 65 L. J. Q. B. 693, 75 L. T. 254, 45 W. R. 124, 13 T. L. R. 694 ..	489
"Schwan," The "Alban," The, (1892) P. 419, 69 L. T. 84, 8 T. L. R. 425, 7 Asp. M. C. 347 ..	57
Scott v. Foley, Atkman & Co. (1899), 5 Com. Cas. 53, 16 T. L. R. 55 ..	16
	54

	PAGE
Scott v. London and S th Katharine Docks Co., (1865), 3 H & C. 596, 34 L. J. Ex. 220; 13 L. T. 148, 13 W. R. 410, 11 Jur (N. S.) 304	75, 180
Scott v. Shepherd, (1773), 1 Sm. L. C. (11th ed.), 454, 3 Wilson, 403, 9 Wm. Bl. 302	51, 67
Seddon v. Tutop, (1796), 6 T. R. 607, 1 E. p. 401; 3 R. R. 274	255, 256
Selmes v. Judge, (1871), L. R. 6 Q. B. 721, 10 L. J. Q. B. 287, 21 L. T. 604, 19 W. R. 1110	246
Senior v. Fountain & Bunley, Ltd., [1907] 2 K. B. 362, 76 L. J. K. B. 928, 97 L. T. 562, 23 T. L. R. 634, 9 W. C. C. 116	472
Senior v. Ward, (1859), 1 E. & E. 345, 28 L. J. Q. B. 139, 7 W. R. 261, 5 Jur. (N. S.) 172	27, 194, 377
Seward v. "Vera Cruz," (1884), 10 App. Cas. 59, 54 L. J. P. 9, 53 L. T. 474, 33 W. R. 477, 19 J. P. 324, 1 T. L. R. 111, 5 App. M. C. 896	103, 119
Seymour v. Greenwood, (1861), 7 H. & N. 355, 30 L. J. Ex. 327, 4 L. T. 833, 9 W. R. 785	119
Shaffer v. General Steam Navigation Co., (1883), 10 Q. B. 356, 52 L. J. Q. B. 260, 48 L. T. 228, 31 W. R. 656, 47 J. P. 327	135, 198, 199, 211, 212, 277
Shallow v. Verdon, (1875), 11 R. 9 C. L. 150	108
Sharman v. Hollday & Greenwood, [1901] 1 K. B. 235, 71 L. J. K. B. 176; 90 L. T. 46, 68 J. P. 151, 20 T. L. R. 185, 6 W. C. C. 147	575
Sharman v. Sanders, (1858), 13 C. D. 166, 22 L. J. C. P. 86, 17 Jur. 765, 1 W. R. 152	274, 278
Sharp v. Johnson & Co., Ltd., [1905] 2 K. B. 139, 74 L. J. K. B. 566; 92 L. T. 675, 53 W. R. 597, 21 T. L. R. 482, 7 W. C. C. 29	381, 383
Sharp v. Pathhead Spinning Co., (1845), 12 R. 571, 22 Sc. L. R. 363	93
Sharp v. Powell, (1872), 1 R. 7 C. P. 251, 41 L. J. C. P. 93, 26 L. T. 486, 20 W. R. 541	55, 65, 66, 70, 221
Sharplington v. Fulham Guardians, [1901] 2 Ch. 404, 71 L. J. Ch. 777, 91 L. T. 739, 52 W. R. 617, 68 J. P. 510, 2 L. G. R. 1229, 20 T. L. R. 643	216
Shaw v. Herefordshire County Council, (1889), 1 Q. B. 242, 64 L. J. Q. B. 867; 81 L. T. 208, 63 J. P. 639, 15 T. L. R. 462	217
Shea v. Droleuxvaux, (1909), 19 T. L. R. 473, 88 L. T. 679, 5 W. C. C. 144	648
Shea v. New York, &c., Railroad Co., (1899), 173 Mass. 177	236
Shearer v. Miller & Sons, (1899), 2 F. 114, 37 Sc. L. R. 80, 7 Sc. L. T. 281	605
Shepherd v. Midland Ry. Co., (1872), 25 L. T. 879, 20 W. R. 705	171
Sheppard v. Gosnold, (1672), Vaugh. 150	15
Sherras v. De Rutzen, [1895] 1 Q. B. 918, 64 L. J. M. C. 218, 73 L. T. 889, 48 W. R. 536, 59 J. P. 440, 11 T. L. R. 369, 18 Cox C. C. 167, 15 R. 348	166
Shields v. Murdock, (1898), 20 R. 727; 30 W. R. 650	24
Shiells v. Blackburne, (1789), 1 H. Bl. 158, 2 R. R. 750	63
Shirreff's Case, (1872), L. R. 14 Eq. 417, 42 L. T. Ch. 5, 20 W. R. 966	11
Silvester v. Cude, (1899), 15 T. L. R. 134, 2 W. C. C. 120	606, 618, 696
Sinat v. Sinat, (1887), 8 N. S. W. R. (Law) 415	187

Table of Cases

IXVII

	PAGE
Simulonds, <i>Ex parte</i> , Carnac, <i>In re</i> , (1885), 16 Q. B. D. 308, 55 L. J. Q. B. 74; 54 L. T. 439; 34 W. R. 421 ...	584
Simmons v. Faulds, (1901), 65 J. P. 371, 15 T. L. R. 352, 1 W. C. C. 169 ...	446, 447
Simmons v. White Brothers, (1899), 1 Q. B. 1005, 69 L. J. Q. B. 507; 80 L. T. 344, 47 W. R. 513, 15 T. L. R. 263, 1 W. C. C. 89 ...	470, 549
Simms v. Registrar of Probates, (1900), 1 A. C. 323, 69 L. J. P. C. 37, 82 L. T. 433 ...	362
Simpson v. Elllow Vale Steel, Iron and Coal Co., (1905), 1 K. B. 453, 74 L. J. K. B. 317, 92 L. T. 242, 53 W. R. 390, 21 T. L. R. 209, 7 W. C. C. 101 ...	366, 443, 444
Simpson v. Paton, (1896), 23 R. 390, 33 Sc. L. R. 113, 3 Sc. L. T. 309 ...	182, 185
Simson v. London General Omnibus Co. (1873), 1 L. R. 8 C. P. 390, 42 L. J. C. P. 112, 21 W. R. 595 <i>sub nom</i> Smith v. L. G. O. Co., 28 L. T. 560 ...	73
Simclair v. Maritime Passengers Assurance Co., (1861), 3 El. & El. 478, 30 L. J. Q. B. 77, 4 L. T. 15, 7 Jur. (N. S.) 367, 9 W. R. 342 ...	16
Singleton v. Eastern Counties Ry. Co., (1859), 7 C. B. N. S. 287 ...	80
Skeggs v. Keen & Co., (1899), 1 W. C. C. 85, 1 W. C. C. 119, Times, 21st February, <i>ibid</i> , 19th June ...	656, 637, 658
Skelton v. L. & N.-W. Ry. Co., (1867), 1 L. R. 2 C. P. 631, 36 L. J. C. P. 249, 16 L. T. 563, 15 W. R. 925 ...	71, 81
Skerrett v. Scallan, (1877), 11 R. 11 C. L. 949, 11 Ir. L. T. 135 ...	23
Skilbeck v. Garbett, (1845), 7 Q. B. 846, 14 L. J. Q. B. 338, 9 Jur. 339 ...	264
Skipp v. Eastern Counties Ry. Co., (1853), 9 Ex. 221, 23 L. J. Ex. 28, 2 C. L. R. 185 ...	6, 8, 27
Slade v. Victorian Railways Commissioners, (1889), 15 Vict. L. J. 190 ...	95
Slater v. Baker, (1767), 2 Wils. (C. P.) 339 ...	63
Slater v. Mercereau, (1876), 64 N. Y. 135 ...	286
Sloeman v. Bainton, (1864), 2 H. & C. 934, 33 L. J. Ex. 153, 9 L. T. 334, 12 W. R. 411, 10 Jur. (N. S.) 176 ...	278
Sly v. Edgeley, (1806), 6 Esp. (N. P.) 6 ...	285
Small v. Attwood, <i>see</i> Attwood v. Small ...	
Small v. McCormick, (1899), 1 F. 893, 36 Sc. L. R. 700, 7 Sc. L. T. 35 ...	522
Smith v. Anderson, (1880), 15 Ch. D. 247, 50 L. J. Ch. 39, 43 L. T. 329, 29 W. R. 21 ...	459
Smith v. Associated Omnibus Co., (1907), 1 K. B. 916, 76 L. J. K. B. 571, 96 L. T. 675, 71 J. P. 239, 23 T. L. R. 381 ...	270, 271
Smith v. Bailey, (1891), 2 Q. B. 403, 60 L. J. Q. B. 779, 65 L. T. 331, 40 W. R. 23, 56 J. P. 116 ...	144
Smith v. Baker, (1891), 1 A. C. 325; 60 L. J. Q. B. 683, 65 L. T. 467; 40 W. R. 392, 55 J. P. 660, 7 T. L. R. 679, 68, 13, 23, 25, 29, 31, 33, 39, 87, 96, 193, 265, 163, 173, 193, 330 ...	
Smith v. Browne, (1891), 28 L. R. Ir. 1 ...	91
Smith v. Dowell, (1862), 8 F. & F. 288 ...	27
Smith v. Forbes, (1897), 24 R. 699; 34 Sc. L. R. 513, 1 Sc. L. T. 341 ...	23
Smith v. G. E. Ry. Co., (1866), 2 R. 2 C. P. 4, 36 L. J. C. P. 22, 15 L. T. 246, 15 W. R. 181 ...	79

	PAGE
Smith v. Harrison, (1830), 5 T. L. R. 406	150, 205
Smith v. Howard, (1870), 23 L. T. 130	23
Smith v. Johnson, (1897), (unreported), see Duffell v. White, [1901] 2 K. B. 675, and Wilkinson v. Downton, [1897] 2 Q. B. 61	84
Smith v. Lancashire and Yorkshire Ry. Co., [1899] 1 Q. B. 141, 68 L. J. Q. B. 516, 79 L. T. 533, 17 W. R. 146, 15 T. L. R. 61, 1 W. G. C. 1	369, 374, 374, 638
Smith v. L. & S. W. Ry. Co. (1870), 1 R. b. C. P. 14, 40 L. J. C. P. 21, 23 L. T. 678, 19 W. R. 230	67, 69
Smith v. L. G. O. Co., see Simpson v. L. G. O. Co.	
Smith v. Midland Ry. Co., (1887), 57 L. T. 813, 52 J. P. 262, 4 T. L. R. 68	75
Smith v. Northleach Rural District Council, [1902] 1 Ch. 197, 71 L. J. Ch. 8, 85 L. T. 499, 50 W. R. 101, 66 J. P. 88, 18 T. L. R. 30	217
Smith v. S. E. Ry. Co., [1896] 1 Q. B. 178, 65 L. J. Q. B. 219, 74 L. T. 614, 41 W. R. 291, 60 J. P. 148	80, 81
Smith v. S. Normanton Colliery Co., Ltd., [1903] 1 K. B. 300; 72 L. J. K. B. 76, 88 L. T. 5, 61 W. R. 202, 67 J. P. 84, 19 T. L. R. 128, 5 W. G. C. 11	375, 387
Smith v. Steele, (1875), 1 R. 10 Q. B. 125, 41 L. J. Q. B. 60, 32 L. T. 195, 23 W. R. 383	11, 51
Smithwhite v. Moore & Sons, Ltd., (1898), 14 T. L. R. 461	21
Smout v. Ilbery, (1842), 10 M. & W. 1, 12 L. J. 157	12
"Snark," The, [1900] P. 105, 69 L. J. P. 41, 82 L. T. 12, 18 W. R. 279, 16 T. L. R. 160, 9 Asp. M. C. 50	287
Snoddon v. Glasgow Coal Co., (1905), 7 F. 485, 12 Sc. L. R. 965, 12 Sc. L. T. 717	105, 112
Snoddon v. Robert Addie & Sons Colliery Co., Ltd., [1901], 1 F. 992, 11 Sc. L. R. 826	101, 161, 165
Snee v. Duke, (1801), 6 F. 12, 11 Sc. J. R. 90	73
Sneeby v. Lancashire and Yorkshire Ry. Co., (1874), L. R. 9 Q. B. 263, (1875), 1 Q. B. 13 12, 15 L. J. 12 B. 1	70
Snook v. Utand Junction Waterworks Co., (1886), 2 T. L. R. 308	61
Snowden v. Baynes, (1890), 25 Q. B. D. 191, 59 L. J. Q. B. 325, 38 W. R. 711, 55 J. P. 111	204, 219, 220, 221
Southport (Mayor of) v. Morris, [1893] 1 Q. B. 339, 62 L. J. M. C. 47, 68 L. T. 221, 41 W. R. 342, 57 J. P. 231, 7 Asp. M. C. 279	452
South Staffordshire Tramways Co. v. Suckness and Accident Assur- ance Association, [1891] 1 Q. B. 402, 60 L. J. Q. B. 47, 63 L. T. 807, 55 J. P. 103, 7 T. L. R. 267	16
Southcott v. Stanley, (1856), 1 H. & N. 237, 25 L. J. Ex. 430	5, 298
Southern Pacific Co. v. Seloy, (1894), 152 U. S. (45 Davis) 145	159
Southhook Fire-Clay Co., Ltd. v. Langland, [1908] S. C. 831, 45 So. L. R. 66	576
Spacey v. Downham Gas and Coke Co., [1905] 2 K. B. 879, 75 L. J. K. B. 5, 93 L. T. 695, 51 W. R. 134, 22 T. L. R. 29, 8 W. G. C. 29	490
Spraght v. Tedcastle, (1881), 6 App. Cas. 217, 44 L. T. 589, 29 W. R. 761, 4 Asp. M. C. 106	90

Table of Cases

lxix

	PAGE
<i>Spencer v. Watts</i> , (1889), 28 Q. B. D. 350, 58 L. J. Q. B. 383; 61 L. T. 711; 37 W. R. 676	597
<i>Spittal v. Glasgow Corporation</i> , (1904), 6 F. 828, 41 Sc. 12, 629 ...	247
<i>Squires v. Midland Lace Co., Ltd.</i> , [1905] 2 K. B. 448, 74 L. J. K. B. 614, 93 L. T. 29, 51 W. R. 653, 69 J. P. 257, 21 T. L. R. 466	278, 448
<i>Stables v. Eloy</i> , (1825), 1 C. & P. 614	144
<i>Stalker v. Wallace</i> , (1900), 2 F. 1162, 37 Sc. L. R. 898	493
<i>Stamp v. Williams</i> , (1896), 12 T. L. R. 516	200
<i>Stanland v. N. E. Steel Co.</i> , cited in <i>Williams v. Ocean Coal Co.</i> , Ltd., [1907] 2 K. B. 425 note	463
<i>Stanley v. Powell</i> , [1891] 1 Q. B. 86, 60 L. J. Q. B. 52, 63 L. T. 809, 39 W. R. 76, 55 J. P. 427, 7 T. L. R. 25	694
<i>Stanton v. Perera</i> , (1856), 5 H. L. C. 257	81
<i>Stanton v. Scrutton</i> , (1893), 63 T. J. Q. B. 405, 9 T. L. R. 236, 5 R. 214	165, 178, 180
<i>Staples v. Accidental Death Insurance Co.</i> , (1861), 10 W. R. 59	257
<i>Stead v. Moore</i> , (1900), 2 W. C. C. 96, <i>Times</i> newspaper, 13th June	493
<i>Stearns v. Ontario Spinning Co.</i> , (1898), 144 Pa. St. 323	74
<i>Stedman v. Baker & Co.</i> , (1896), 12 T. L. R. 451	163
<i>Steel v. Cammell, Laird & Co.</i> , [1905] 2 K. B. 232, 74 L. J. K. B. 610, 93 L. T. 157, 51 W. R. 612, 21 T. L. R. 190, 7 W. C. C. 9	348, 355, 357, 365, 366
<i>Steel v. Oakbank Oil Co.</i> , (1902), 5 F. 214, 40 Sc. L. R. 205, 10 Sc. L. T. 505	570
<i>Steele v. G. N. Ry. Co.</i> , (1890) 26 L. R. 11 96	104
<i>Stephen v. Thurso Police Commissioners</i> , (1876), 3 R. 535	287
<i>Stephens v. Austral Oil Engineering Co.</i> , (1902), 27 Viet. L. J. R. 724	254
<i>Stephens v. Dulhridge Ironworks Co., Ltd.</i> [1904] 2 K. B. 225, 73 L. J. K. B. 739, 90 L. T. 448, 52 W. R. 641, 68 J. P. 197, 20 T. L. R. 492, 6 W. C. C. 18	136, 118, 131, 432, 592
<i>Stephens v. Myers</i> , (1890), 1 C. & P. 319, 34 R. R. 811	5
<i>Stevens v. McKenzie</i> , (1899), 25 Viet. L. R. 115	92
<i>Stewart v. Caledonian Ry. Co.</i> , (1870), 8 Macph. 496, 5 Sc. L. R. 277	172
<i>Stewart v. G. W. Ry. Co.</i> , (1865), 2 Do. C. J. & S. 319, 13 L. T. 79, 13 W. R. 907, 11 Jur. (N. S.) 627, 46 Eng. Rep. 939	116, 117
<i>Stiefsohn v. Brook</i> , (1889), 5 T. L. R. 691	94
<i>Stiles v. Cardiff Steam Navigation Co.</i> , (1863), 31 L. J. Q. B. 310, 10 Jur. (N. S.) 1119, 10 L. T. 844, 12 W. R. 1080	50
<i>Stimpson v. Wood</i> , (1888), 57 L. J. Q. B. 484, 70 L. T. 216, 36 W. R. 731, 52 J. P. 822, 4 T. L. R. 589	104
<i>Stockdale v. Nicholson</i> , (1867), L. R. 4 Ex. 859, 36 L. J. Ch. 598, 16 L. T. 767, 15 W. R. 986	289
<i>Stoeken v. Collin</i> , (1841), 7 M. & W. 515, 9 C. & P. 653, 10 L. J. Ex. 227	265
<i>Stone v. Hyde</i> , (1882), 9 Q. B. D. 76, 51 L. J. Q. B. 452, 46 L. T. 421; 80 W. R. 116, 46 J. P. 788	260
<i>Storey v. Ashton</i> , (1869), L. R. 4 Q. B. 476, 10 B. & S. 837; 88 L. J. Q. B. 228, 17 W. R. 727	18, 146, 149
<i>Storment v. Workman, Clark & Co.</i> , (1899), 38 Ir. L. T. newspaper, 165 B. & L.	649

	PAGE
<i>Stretton v. Holmes</i> , (1890), 19 Ont. R. 286	54
<i>Stride v. Diamond Glass Co.</i> , (1895), 26 Ont. R. 270	172, 187
<i>Stuart v. Evans</i> , (1883), 49 L. T. 139, 31 W. R. 706	192, 193, 278
<i>Styles v. Cardiff Steam Navigation Co.</i> , see <i>Styles v. Cardiff, etc., Co.</i>	
<i>Sullivan v. Bennett Steamship Co., Ltd.</i> , (1894), <i>Times</i> newspaper, 10th August	23
<i>Sullivan v. Crood</i> , [1904] 2 L. R. 317, 47 Ir. L. T. 251	59
<i>Sutton v. L. G. & D. Ry. Co.</i> , (1890), 12 T. L. R. 425	443
<i>Sutton v. Johnstone</i> , see <i>Johnstone v. Sutton</i>	
<i>Sutton v. Sutton</i> , (1882), 22 Ch. D. 511, 52 L. J. Ch. 331, 48 T. L. T. 95; 31 W. R. 379	123
<i>Swanson v. N.-E. Ry. Co.</i> , (1878), 3 Ex. D. 341, 47 L. J. Q. B. 372, 88 L. T. 201, 26 W. R. 413	5, 42, 199
<i>Swan v. Blair</i> , (1885), 3 Cl. & F. 610	245
<i>Swansea Improvements and Tramway Co. v. Swansea Urban Sanitary Authority</i> , [1892] 1 Q. B. 357, 61 L. J. M. C. 124, 66 L. T. 119, 30 W. R. 283, 56 J. P. 215	114
<i>Sweeney v. Duncan</i> , (1892), 19 R. 870, 29 Sc. L. R. 777	113
<i>Sweeney v. McIlroy</i> , (1886), 11 R. 105, 21 Sc. L. R. 91	199, 201, 205, 211, 372
<i>Sweeney v. Pumphreston Oil Co.</i> , (1904), 5 F. 972, 40 Sc. L. R. 731, 11 Sc. L. T. 279	578
<i>Sword v. Cameron</i> , (1839), 1 Dunlop 498	23, 71
<i>Sykes v. N.-E. Ry. Co.</i> , (1875), 41 L. J. C. P. 391, 32 L. T. 199, 28 W. R. 473	110
<i>Tasker v. Shepherd</i> , (1861), 6 H. & N. 575, 30 L. J. Ex. 207, 41 L. T. 19, 9 W. R. 176	10
<i>Tarrant v. Webb</i> , (1856), 18 C. B. 797, 25 L. J. C. P. 261, 1 W. R. 610	24
<i>Tarry v. Ashton</i> , (1876), 1 Q. B. D. 311, 15 L. J. Q. B. 200, 34 L. T. 97, 24 W. R. 581	20, 29, 77, 180, 196
<i>Tate v. Latham & Son</i> , [1897] 1 Q. B. 502, 66 L. J. Q. B. 349, 76 L. T. 396, 45 W. R. 400, 13 T. T. R. 251	25, 167, 176
<i>Taylor v. Hampstead Colliery Co.</i> , [1904] 1 K. B. 838, 73 L. J. K. B. 469, 90 L. T. 363, 52 W. R. 117, 64 J. P. 300, 29 T. L. R. 838, 6 W. C. C. 34	120, 436, 437
<i>Taylor v. Manchester, Sheffield and Lincolnshire Ry. Co.</i> , [1895] 1 Q. B. 134, 64 L. J. Q. B. 6, 71 L. T. 596, 13 W. R. 120, 59 J. P. 100, 11 T. L. R. 27, 14 R. 84	4, 418
<i>Tench v. Fish & Sons</i> , (1901), 111 L. T. newspaper, 42, 3 W. C. C. 140	498
<i>Thomas v. Great Western Colliery Co.</i> , (1894), 10 T. L. R. 244	19, 60, 133, 157
<i>Thomas v. Quartermaster</i> , (1887), 18 Q. B. D. 685, 36 L. J. Q. B. 840, 57 L. T. 537, 35 W. R. 555, 51 J. P. 516, 3 T. L. R. 495	82
37, 39, 49, 135, 136, 156, 157, 162, 163, 164, 192, 193, 228, 298	
<i>Thomas v. Winchester</i> , (1852), 6 N. Y. 397, Bigelow, <i>Leading Cases on Torts</i> , 662	54
" <i>Thomas Powell</i> ," <i>The v. "Cuba," The</i> , (1865), 2 Mar. Law Cas. 344, 14 L. T. 608	16
<i>Thompson v. Ashington Coal Co., Ltd.</i> , (1901), 84 L. T. 412, 65 J. P. 350, 17 T. L. R. 845, 9 W. C. C. 21	350

Table of Cases

lxxi

	PAGE
<i>Thompson v. City Glass Bottle Co.</i> , [1902] 1 K. B. 298; 71 L. J. K. B. 145, 85 L. T. 661; 18 T. L. R. 69	189, 190, 191
<i>Thompson v. North-Eastern Marine Engineering Co., Ltd.</i> , [1908] 1 K. B. 428, 72 L. J. K. B. 222, 88 L. T. 239, 19 T. L. R. 206, 5 W. C. C. 71	682, 688
<i>Thompson v. N-E Ry. Co.</i> , (1860), 2 B. & S. 100, (1862), 16 119, 31 L. J. Q. B. 121, 6 L. T. 127, 10 W. R. 401, 5 In. (N. S.) 991	87, 682
<i>Thompson v. Schmidt</i> , (1891), 56 J. P. 212, 8 T. L. R. 120	68
<i>Thompson v. Southern Coal Co.</i> , (1891), 15 N. S. W. L. R. (Law) 162	243
<i>Thompson v. Wright</i> , (1892), 22 Ont. R. 127	180
<i>Thompson v. Dick</i> , (1892), 19 R. 801, 29 Sc. L. R. 729	134
<i>Thomson v. Robertson</i> , (1884), 12 R. 121, 22 Sc. L. R. 97	260
<i>Thomson v. Scott</i> , (1887), 25 R. 51, 35 Sc. L. R. 93	166
<i>Thomson v. Thomson's Trusts</i> , (1889), 16 R. 318, 26 Sc. L. R. 217	112
<i>Thorogood v. Bryan</i> , (1889), 8 L. B. 115, 18 L. J. C. P. 336	64, 87, 97
<i>Thorpe v. Cooper</i> , (1828), 5 Bing. 116, 2 M. & P. 245, 2 Y. & J. 445	256
<i>Tigne v. Colville & Sons</i> , (1905), 13 Sc. L. R. 129, 40 Colville & Sons v. Tigne	
<i>Tillett v. Morris</i> , (1612), 1 Bulst. 131, 80 Eng. Rep. 828	108
<i>Todd v. Todd v. Caledonian Ry. Co.</i> , (1889), 1 P. 1047, 36 Sc. L. R. 784, 7 Sc. L. T. 85	384
<i>Tolman v. Pothbury</i> , (1870), L. R. 5 Q. B. 288, 39 L. J. Q. B. 136, 22 L. T. 83, 18 W. R. 579	71
<i>Tolhausen v. Davies</i> , (1888), 57 L. J. Q. B. 392, 59 L. T. 496, 52 J. P. 804, 58 L. J. Q. B. 98, 5 T. L. R. 18	73, 94
<i>Tong v. O. N. Ry.</i> , (1902), 18 T. L. R. 566, 81 L. T. 802, 66 J. P. 677, 4 W. C. C. 40	688
<i>Toomey or Toomey v. London, Brighton and South Coast Ry. Co.</i> , (1857), 3 C. B. N. S. 146, 27 L. J. C. P. 39, 6 W. R. 31	78
<i>Toomey v. Williams</i> , (1827), M. & M. 129	264
<i>Tottenham Local Board v. Rowell</i> , (1870), 1 Ex. D. 514, 16 L. J. Ex. 432, 35 L. T. 887, 25 W. R. 135	424
<i>Toxeland v. West Ham Union</i> , [1907] 1 K. B. 920, 76 L. J. K. L. 514, 96 L. T. 519, 71 J. P. 194, 23 T. L. R. 325, 5 L. G. R. 507	448
<i>Trail v. Kelman</i> , (1887), 15 R. 4, 25 Sc. L. R. 8	244
<i>Trail v. Actieselskabul Dalbeatte, Ltd.</i> , (1904), G. F. 798, 41 Sc. L. R. 614	108
<i>Treharne v. Ocean Coal Co., Ltd.</i> , (1905), 21 T. L. R. 621	494
<i>Trenear v. Wells & Co.</i> , (1900), 3 W. C. C. 88, 109 L. T. newspaper, 302	611
<i>Trotter v. Maclean</i> , (1870), 13 Ch. D. 574, 40 L. J. Ch. 256; 42 L. T. 118, 28 W. R. 214	264
<i>Truoker v. Chaplin</i> , (1848), 2 C. & K. 730	103
<i>Tuff v. Warman</i> , (1857), 2 C. B. N. S. 740; (1858), 5 C. B. N. S. 573, 27 L. J. C. P. 322, 5 Jur. (N. S.) 222, 6 W. R. 698	86
<i>Tullis v. Jackson</i> , [1892] 3 Ch. 411, 61 L. J. Ch. 653, 67 L. T. 340, 41 W. R. 11, 8 T. L. R. 691	296
<i>Tunney v. Midland Ry. Co.</i> , (1886), L. R. 1 C. P. 291; 12 Jur. (N. S.) 691	22, 138, 372

	PAGE
<i>Turley v. Daw</i> , (1906), 94 L. T. 216; 22 T. L. R. 231	247
<i>Turnbull v. Lamington Collieries, Ltd.</i> , (1900), 82 L. T. 589; 64 J. P. 404, 16 T. L. R. 360, 2 W. C. C. 81	498, 506, 507
<i>Turner v. Goldsmith</i> , 1891] 1 Q. B. 544, 60 L. J. Q. B. 247; 64 T. L. R. 301, 30 W. R. 517, 7 T. L. R. 233	11
<i>Turner v. G. P. Ry. Co.</i> , (1875), 13 L. T. 431	44, 139, 140
<i>Turner v. Reynall</i> , (1894), 14 C. B. N. S. 328, 32 L. J. C. P. 164, 8 L. T. 281, 11 W. R. 700, 9 Jur. (N. S.) 1077	678
<i>Turner v. Sawdon</i> , [1901] 2 K. B. 653, 70 L. J. K. B. 897, 85 L. T. 222, 49 W. R. 112, 17 T. L. R. 645	10
<i>Turners, Ltd. v. Gillies or Whitefield</i> , (1904), 6 F. 822, 11 Sc. L. R. 611, 12 Sc. L. T. 131	161, 165, 468
<i>Turney v. Bantons, Ltd.</i> , [1904] 1 K. B. 328, affirmed sub nom. <i>Bantons, Ltd. v. Turney, y. l.</i>	347, 348
<i>Tyler, J. re. Official Receiver, &c. p. p. l.</i> , [1907] 1 K. B. 865, 76 L. J. K. B. 511, 97 L. T. 30, 21 T. L. R. 328, 14 Mans. 73	584
<i>Union Pacific Railroad Co. v. Stout</i> , (1873), 17 Wall. (U. S.) 557	40, 208
<i>Union Pacific Ry. Co. v. Buford</i> , (1890), 111 U. S. (34 Davis) 250	675
<i>Union Pacific Ry. Co. v. McDonald</i> , (1894), 152 U. S. (16 Davis) 262	99
<i>Union Steamship Co., Ltd. v. Chandler</i> , [1894] A. C. 185, 63 L. J. P. C. 60, 70 L. T. 777, 58 J. P. 366, 7 App. Cl. C. 412, 6 R. 434	11, 110, 296
<i>United Collieries v. Gavin</i> , (1899), 2 F. 60, 37 Sc. L. R. 47	638
<i>Valenti v. Wm. Dixon</i> , 1907, S. C. 695, 41 Sc. L. R. 512	118
<i>Vamplew v. Parkgate Iron and Steel Co.</i> , (1903) 1 K. B. 851, 72 L. J. K. B. 575, 88 L. T. 756, 51 W. R. 691, 67 J. P. 417, 19 T. L. R. 421, 5 W. C. C. 111	446, 447
<i>Van De Eynde v. Ulster Ry. Co.</i> , (1871), 11 R. 5 C. 1 324	154
<i>Vaughan v. Booth</i> , (1852), 16 Jur. 808	208
<i>Vaughan v. Cork and Youghal Ry. Co.</i> , (1860), 12 L. C. L. R. 297	29, 31
<i>Vaughan v. Nicoll</i> , (1906), 8 F. 464, 43 Sc. L. R. 351, 14 Sc. L. T. 804	407
<i>Vaughan v. Tuff Vale Ry. Co.</i> , (1860), 5 H. & N. 679, 29 L. J. K. 247, 2 L. T. 394, 8 W. R. 549, 6 Jur. (N. S.) 899	49
<i>Vonables v. Smith</i> , (1877), 2 Q. B. D. 279, 46 L. J. Q. B. 170, 36 L. T. 600, 25 W. R. 584	63
<i>Vera Cruz, The</i> , (No. 2), <i>see</i> <i>Seaward v. The Vera Cruz</i>	
<i>Vickers v. G. E. Ry. Co.</i> , (1898), 79 L. T. 121, 14 T. L. R. 562	138, 372
<i>Vicksburg Railroad Co. v. Putnam</i> , (1856), 118 U. S. 545	114
<i>Victorian Ry. Commissioners v. Countess</i> , (1889), 13 App. Cas. 222, 57 L. J. P. C. 69, 58 L. T. 390, 37 W. R. 129, 52 J. P. 500, 4 T. L. R. 226	84
<i>Villar v. Gilbey</i> , [1907] A. C. 139, 76 L. J. Ch. 319, 96 L. T. 511, 23 T. L. R. 392	104
<i>Vose v. Lancashire and Yorkshire Ry. Co.</i> , (1859), 2 H. & N. 728, 27 L. J. Ex. 249; 4 Jur. (N. S.) 864; 6 W. R. 205	227

Table of Cases

lxxiii

	PAGE
Wainwright v Crichton, (1901), 117 Law Times newspaper, 2	476
Waite v. N.-E. Ry. Co., (1858), 13 B. & F. 719. (1859), 16 F. 24, 24	
L. J. Q. B. 254, 5 Jur. (N. S.) 99, 7 W. R. 311	93, 96
Wakelin v. L. & S.-W. Ry. Co., (1886), 12 App. Cas. 11, 56 L. J.	
Q. B. 229, 55 L. T. 709, 35 W. R. 141, 51 J. P. 94, 83 T. L. R.	72, 76, 81, 98, 371
231	
Wakeman v. Robinson, (1823), 1 Bing. 211, 8 Moore (C. P.) 63, 1	16
L. J. (O. S.) C. P. 70, 25 R. R. 618	
Waldock v. Winfield, [1901], 2 K. B. 536, 70 L. J. K. B. 927, 85	45, 141
L. T. 202, 17 T. L. R. 661	
Walker v. Gann, (1826), 7 D. & R. 769	257
Walker v. Goe, (1859), 3 H. & N. 335, (1870), 1 H. & N. 350, 24	68
L. J. Ex. 184, 5 Jur. (N. S.) 737, 7 W. R. 289	
Walker v. Olsen, (1882), 9 R. 946, 19 Sc. L. R. 708	179
Wallace v. Culter Paper Mills Co., Ltd., (1902), 19 R. 915, 29 Sc.	12, 165
L. R. 781	
Wallace v. Glenborg Union Firety Co., [1907] S. C. 967, 11 Sc.	412
L. R. 726	
Wallace v. R. W. Hawthorne, Leslie & Co., Ltd., 1904] S. C. 713,	131, 703
45 Sc. L. R. 517	
Walley v. Holt (1876), 35 L. T. 611	281
Walker v. Smith, (1882), 21 Ch. D. 211, 52 L. J. Ch. 145, 47 L. T.	
189, 31 W. R. 211	295
Walsh v. Whiteley, (1888), 21 Q. B. D. 371, 57 L. J. Q. B. 586, 86	
W. R. 876, 53 L. P. 8, 1 T. L. R. 691	159, 160, 161, 166, 167, 173, 176, 177
Walter v. Haynes, (1821), Ry. & M. 119	265
Walton v. London Brighton and South Coast Ry. Co., (1866), 1 L. & R.	
424, 11 L. P. 251, 14 W. R. 395	86
Watbourn v. G. W. Ry. Co., (1866), L. R. 2 Ex. 90, 4 H. & C. 605,	
36 L. J. Ex. 9, 15 L. T. 361, 15 W. R. 108	42
Ward v. L. & N.-W. Ry. Co., (1901), 111 Law Times newspaper, 207,	
3 W. C. C. 192	561
Ward v. London General Omnibus Co., (1879), 12 L. J. C. P. 265,	
28 L. T. 850	148, 119
Ware, In re, Cambridge v. Cambridge-Ware, (1890), 45 Ch. D.	
269, 59 L. J. Ch. 717, 61 L. T. 52, 38 W. R. 767	289
Warneken v. R. Moreland & Son, (1909), Times newspaper, 1st Dec	518
Warneck v. Glasgow Iron and Steel Co., (1904), 6 F. 174, 11 Sc.	
L. R. 359, 11 Sc. L. T. 697	331
Warren v. Warren, (1834), 1 C. M. & R. 250, 1 Tyr. 860, 3 L. J.	
Ex. 291	266
Warren v. Wilder or Wildoc, (1872) W. N. 87; 41 L. J. C. P. 104, n.	22
Washburn and Moen Manufacturing Co. v. Patterson, (1885), 29 Ch.	
D. 48, 54 L. J. Ch. 643, 52 L. T. 705, 33 W. R. 407	191
Waterson v. Murray, (1844), 11 R. 1030, 21 Sc. L. R. 695	159
Watson v. M'Lish, (1898), 25 R. 1028	184
Watson v. Weekes, (1887), cited on Tolhausen v. Davis, (1888), 57	
L. J. Q. B. at p. 394	78
Watt v. Neilson, (1888), 15 R. 772; 25 Sc. L. R. 576	29

	PAGE
Wear River Commissioners v. Adamson, (1877), 2 App. Cas. 743; 47 L. J. Q. B. 153, 37 L. T. 519, 26 W. R. 217	64
Wheeler v. Lloyd, (1852), 21 L. J. Q. B. 151, 16 Jur. 289	275, 278
Weaver v. Ward, (1616), 110b. 131, 80 Eng. Rep. 241	50, 52
Weavings v. Kirk & Randall, [1904], 1 K. B. 218, 71 L. J. K. B. 77; 89 L. T. 577, 52 W. R. 209, 65 J. P. 91, 20 T. L. R. 152, 6 W. C. C. 95	493
Webb v. Remue, (1865), 4 F. & F. 608	36, 80, 170, 181
Weblin v. Balland, (1846), 17 Q. B. D. 122, 55 L. J. Q. B. 395, 54 L. T. 582, 41 W. R. 455, 50 J. P. 597, 2 T. L. R. 111, 134, 158, 159, 192, 196, 293, 294	134, 158, 159, 192, 196, 293, 294
Webster v. Foley, (1892), 21 Can. S. C. R. 580	193
Webster v. L. & N.-W. Ry. Co., (1901), 3 W. C. C. 52, 111 Law Times newspaper, 299	573
Webster v. Sharp & Co., [1904], 1 K. B. 218, 73 L. J. K. B. 111, 89 L. J. 627, 53 W. R. 275, 68 J. P. 110, 20 T. L. R. 121, 6 W. C. C. 129, affirmed by consent, [1905], 1 C. 284, 74 L. J. K. B. 776, 92 L. T. 373	560, 570, 571
Woomers v. Matheson, (1861), 4 Man. (H. L. Sc.) 215, 1 Paterson 1014	29, 161, 178, 227
Weir v. Coltness Iron Co., (1849), 16 B. 611, 20 Sc. L. R. 170	107
Welch v. Grace, (1897), 167 Mass. 520	186
Welfare v. London and Brighton Ry. Co., (1894), 11 B. 1 Q. B. 633, 58 L. J. Q. B. 211, 20 L. T. 743, 17 W. R. 1065	77
Wells v. Gaslight Wharton, (No. 2), 1897, 1 C. 337, 66 L. J. Adm. 99, 76 L. T. 661	452
Welland v. G. W. Ry. Co., (1900), 16 T. L. R. 297, 2 W. C. C. 115	640, 643, 645
Welsh v. Mon, (1845), 12 B. 590, 22 Sc. L. R. 781	159
West Ham Local Board v. Maddams, (1876), 40 L. P. 470, 1 L. R. 516, 2, 3 L. T. 809	124
Whalley v. Manchester and Yorkshire Ry. Co., (1881), 13 Q. B. D. 181, 51 L. J. Q. B. 245, 50 L. T. 472, 32 W. R. 711, 34 J. P. 500	69
Whitely v. Holloway, (1890), 54 J. P. 615, 6 T. L. R. 351	132, 222, 240, 241, 252
Whitman v. Peatson, (1864), L. R. 8 C. P. 422, 37 L. J. C. P. 156, 14 L. T. 210, 16 W. R. 649	55, 147
Wholesale v. Rhymney Iron Co. Ltd., [1902], 1 K. B. 57, 71 L. J. K. B. 23, 85 L. T. 472, 80 W. R. 115, 65 J. P. 804, 18 T. L. R. 21, 4 W. C. C. 120	568
Whitmore v. Waterhouse, (1880), 4 C. & P. 383	693
Whitby v. Brock, (1888), 4 T. L. R. 241	50
Whitcomb & Tombert v. Taylor, (1907), 27 N. Z. L. R. 237	512
White v. Parker, (1889), 16 Can. S. C. R. 699	115
Whitechurch (George), Ltd. v. Gwynnigh, [1903], A. C. 117, 71 L. J. K. B. 491, 85 L. T. 349, 50 W. R. 218, 9 Mans. 351	143
Whitehead v. Reader, [1901], 2 K. B. 48, 70 L. J. K. B. 546, 84 L. T. 514, 49 W. R. 562, 65 J. P. 408, 17 T. L. R. 387, 3 W. C. C. 40	375, 386, 412

Table of Cases

lxxv

	PAGE
Whiteley v Armitage, (1864), 13 W. R. 144	276
Whitfield v Lord Le Despencer, (1778), 2 Cowp. 764	268
Whitloy, Partners, Ltd, <i>In re</i> , (1846), 33 Ch D 337, 55 L J. Ch. 540, 54 L T 912, 84 W. R. 505, 2 T. L. R. 541	482
Whittingham v Hill, (1614), Cro. Jac. 194, 79 Eng Rep 121	282
Wicks or Wilkes v Dowell, [1907] 2 K B 225, 74 L J K B 572, 92 L T 677, 51 W R 515, 21 T L R 487, 7 W C. C. 14	352
Wignett v Fox, (1856), 11 Ex 882, 25 L J Ex 188, 2 Jur. (N. S.) 955, 1 W. R. 254	48, 484
Wightwick v Pope, [1902] 2 K B 79, 71 L J K B 709, 86 L T 750, 50 W R 681, 18 T L R 639	648
Wigmore v Jay, (1850), 5 Ex 351, 19 L J Ex 300, 14 Jur. 887	15, 41
Wild v Waygood, 1892, 1 Q B 583, 61 L J Q B 891, 36 L T 309, 40 W R 501, 60 J P 889, 4 T L R 110	201, 218, 214, 215, 216, 217, 219, 221, 222
Wilkes's case, (1770), 19 How. St Tr 1075, 4 Burr 2527	295
Wilkes v Dowell, <i>see</i> Wicks or Wilkes v Dowell	
Wilkinson v Downton, 1897 2 Q B 57, 66 L J Q B 498, 76 L T 491, 45 W R 525, 13 T L R 348	84
Wilkinson v Rinned Cannel and Coking Coal Co., Ltd., (1897), 24 R 1001, 3189 L R 543, 45 L T 319	92
Willerts v Witt 1892 2 Q B 92, 61 L J Q B 540, 66 L T 818, 40 W R 397, 60 J P 772, 5 T L R 513	166, 167, 170
Williams v Army and Navy Auxiliary Co., Ltd., (1907), 24 T. L. R. 404, 9 W C. C. 133	654
Williams v Birmingham Battery and Metal Co., [1899] 2 Q B 338, 68 L J Q B 918, 81 L T 62, 17 W R 640, 15 T L R 468, 3, 21, 27, 29, 31, 32, 33, 37, 193	3, 21, 27, 29, 31, 32, 33, 37, 193
Williams v Clough, (1858), 3 H & N 258, 27 L J Ex 325, 27, 39, 228	27, 39, 228
Williams v East India Co. (1802), 3 East 192, 6 R R 549	72, 76
Williams v G W Ry Co., (1871), L R 9 Ex 157, 49 L J 152, 105, 81 L T 124, 22 W R 581	76, 80
Williams v Jones, (1865) 9 H & A 256, 33 L J Ex 297, 3 H & C 142, 13 L T 300, 19 W R 1028, 11 Jur. (N. S.) 843	146
Williams v Mersey Dock and Harbour Board, 1905, 1 K B 804, 74 L J K B 481, 92 L T 111, 53 W R 188, 39 J P 196, 21 T L R 397, 3 L G R 529	103, 247
Williams v Ocean Coal Co., [1907] 2 K B 122, 76 L J K B 1078, 95 L T 150, 23 T L R 541	104, 463, 466, 467
Williams v Penikwyber Navigation Colliery Co., (1904), 19 T. L. R. 490	372
Williams v Ponson, (1899), 68 J P 567, 16 T. L. R. 42, 2 W C. C. 126	892, 525, 526
Williams v Vauxhall Colliery Co., Ltd., [1907] 2 K B 483, 76 L J K B 854, 97 L T 559, 23 T L R 591, 60 W. C. C. 120	421, 486, 561
Willmott v Paton, [1902] 1 K B 237, 71 L J K B 1, 86 L T 569, 50 W R 143, 66 J. P. 197, 18 T L R 48	511
Willoughby v G W Ry. Co. (1904), 6 W. C. C. 28, 117 Law Times newspaper, 28	350
Wilson v Boyle, (1889), 17 R. 62, 27 So L R. 57	80

	PAGE
Wilson v. Caledonian Ry. Co., (1899), 2 F. 319, 37 So. L. R. 235	30, 30, 228
Wilson v. Glasgow Tramways and Omnibus Co., (1878), 5 R. 981, 15 So. L. R. 656	269
Wilson v. Love, (1887), 25 R. 280, 35 So. L. R. 223, 5 So. L. T. 217	165
Wilson v. McIntosh, (1894), A. C. 123, 63 L. J. P. C. 49, 70 L. T. 536, 6 R. 429	295, 429
Wilson v. Morty, (1868), L. R. 1 H. L. Sc. 326, 19 L. T. 80, 4, 14, 15, 23, 41, 206, 251, 413	113, 131
Wilson v. Ocean Coal Co., Ltd., (1905), 31 T. L. R. 621, 7 W. C. C. 34	113, 131
Wilson v. Zulueta, (1849), 14 Q. B. 405, 19 L. J. Q. B. 49, 11 Jur. 366	269
Winspear v. Accident Insurance Co., (1880), 6 Q. B. 12, 50 L. J. Q. B. 292, 13 L. T. 159, 23 W. R. 110, 15 J. P. 110	16
Wisely v. Aberdeen Harbour Commissioners, (1887), 11 R. 115, 21 So. L. R. 315	60, 178
Wolfe v. G. N. Ry. Co., (1890), 26 L. R. 1, 518	110, 111
Wood v. Darrell, (1886), 2 T. L. R. 550	163, 164
Wood v. Gray & Sons, (1892), 1 C. 576, 67 L. T. 624	101, 107
Wood v. Mackay, (1906), 81 L. 625, 13 So. L. R. 158	163
Woodgate v. Knatchbull, (1787), 2 T. R. 118, 1 R. R. 119	155
Woodhead v. Gartness Mineral Co., (1877), 1 R. 169, 14 So. L. R. 370	14, 182
Woodley v. Metropolitan District Ry. Co., (1877), 2 L. J. 381, 16 L. J. Ex. 331, 36 L. T. 119	21, 45, 81, 380
Woods v. Caledonian Ry. Co., (1886), 18 R. 1114, 23 So. L. R. 708	31
Woods v. Carron Iron Co., (1832), 8 T. L. R. 376	171
Woolley v. Sewell, (1829), 3 Man. & Ry. 105, 7 L. J. (O. S.) K. B. 41, 32 R. R. 716	68
Wright v. Glynn, (1902), 1 K. B. 715, 71 L. J. K. B. 297, 86 L. T. 373, 50 W. R. 402, 18 T. L. R. 401	369
Wright v. John Bagnall & Sons, Ltd., (1900), 2 Q. B. 240, 69 L. J. Q. B. 551, 82 L. T. 316, 48 W. R. 538, 61 J. P. 420, 16 T. L. R. 327, 2 W. C. C. 36	613, 615, 617
Wright v. L. & N.-W. Ry. Co., (1875), L. R. 10 Q. B. 298, (1876), 1 Q. B. D. 252, 45 L. J. Q. B. 570, 33 L. T. 830	47
Wright v. London General Omnibus Co., (1877), 2 Q. B. D. 271, 46 L. J. Q. B. 429, 36 L. T. 600, 25 W. R. 647	117, 118, 154
Wright v. Wells, (1887), 3 T. L. R. 779	198, 200
Wright v. Zetland (Marquess), [1906] 1 K. B. 68, 77 L. J. K. B. 152, 97 L. T. 867, 21 T. L. R. 48	449
Wrigley v. Bagley & Wright and Whittaker & Sons, [1901] 1 K. B. 780, 70 L. J. K. B. 588, 84 L. T. 415, 49 W. R. 472, 65 J. P. 372	488, 488, 512
Wrigley v. Whittaker & Sons, [1902] A. C. 209, 71 L. J. K. B. 600, 86 L. T. 775, 50 W. R. 656, 66 J. P. 420, 18 T. L. R. 559, 4 W. C. C. 83	489, 500

Table of Cases

lxxvii

	PAGE
Wyatt v. G. W. Ry. Co., (1865), 6 B. & S. 709, 34 L. J. Q. B. 204; 12 L. T. 568, 13 W. R. 897, 11 Jur. (N. S.) 825	87
Wylho v. Caledonian Ry. Co., (1871), 9 Macph. 468, 43 Sc. Jur. 220	47
Yarmouth v. France, (1887), 19 Q. B. D. 647, 57 L. J. Q. B. 73, 36 W. R. 281, 1 T. L. R. 1	31, 47, 84, 175, 187, 181, 201, 270, 502
"Ydun," The, [1879] P. 236, 48 L. J. P. 301, 81 L. T. 10, 15 T. L. R. 361, 8 App. M. C. 551	246
Yowens v. Noakes, (1840), 6 Q. B. 530, 50 L. J. Q. B. 182, 44 L. T. 128, 28 W. R. 562, 45 J. P. 169	10
Young & Harston's Contract, <i>In re</i> , (1885), 31 Ch. D. 168, 53 L. T. 837, 34 W. R. 81, 50 J. P. 215	15, 395
Young v. Hoffman Manufacturing Co., 3807, 2 K. B. 616, 76 L. J. K. B. 993, 97 L. T. 230, 23 T. L. R. 671	42

TABLE OF STATUTES

	PAGE
43 Eliz c 5, s 2 (Inferior Courts)	258
21 Jac I c 23, s 3 (Inferior Courts)	257
22 & 23 Car II c 10 (Statute of Distributions)	289
29 Geo II c 19 (Regulation of Servants and Apprentices)	272
36 Geo III c 22, s 3 (Making of bread)	155
42 Geo III c 71 (Paupers)	4
4 Geo IV c 31, s 1 (Masters and Servants)	276
6 Geo IV c 120, s 40 (Court of Sessions Act, 1825)	259
1 & 2 Will IV c 37, s 1 (Truck Act, 1831)	272, 294
3 & 4 Will IV c 12, s 39 (Arbitration Act, 1833)	641
3 & 4 Will IV c 103 (Factories)	4, 39
1 & 2 Vict c 106 (Prisals Act, 1838)	448
2 & 3 Vict c 47, s 51 (Police Act)	66
5 & 6 Vict c 99 (Mines and Collieries)	4
6 & 7 Vict c 86, s 28 (London Hackney Carriage)	154
7 & 8 Vict c 15 (Factories Act, 1844)	4
s 21	39
8 & 9 Vict c 20, ss 103 & 101 (Railway Clauses Consolidation Act, 1845)	151, 152
9 & 10 Vict c 91 (Fatal Accidents Act 1816 "Lord Campbell's Act")	101, 119, 242, 287
s 1	.. 52, 108
s 2	101, 242, 290, 548
s 3	.. 108
s 4	106
s 5	106, 290
s 6	.. 107
14 & 15 Vict c 90, s 16 (Violence Act, 1851)	624
21 & 22 Vict c 90, s 27 (Medical Act, 1858)	678
s 14	.. 678
23 & 24 Vict c 151 (Metaliferous Mines Regulation Act, 1860)	.. 4
24 Vict c 10, s 7 (Admiralty Court Act, 1861)	.. 119
24 & 25 Vict c 100, s 35 (Offences against the Person Act, 1861)	.. 84
24 & 25 Vict c 101 (Statute Law Revision Act, 1861)	.. 155
27 & 28 Vict c 95 (Lord Campbell's Act Amendment Act, 1864)	101, 107, 242, 248, 290
30 & 31 Vict c 14 (Master and Servant Act, 1867)

	PAGE
30 & 31 Vict. c. 105 (Councils of Conciliation Act, 1867)	624, 670
30 & 31 Vict. c. 140 (Workshops Regulation Act, 1867)	275
31 & 32 Vict. c. 119, s. 22 (Regulation of Railways Act, 1868)	62, 675
32 & 33 Vict. c. 62 (Debtors Act, 1869)	316, 669
32 & 33 Vict. c. 71, s. 15, sub-s. 5 (Bankruptcy Act, 1869)	373
33 & 34 Vict. c. 78 (Pinnways Act, 1870)	238
34 & 35 Vict. c. 108, s. 3 (Pauper Lunatics Discharge and Regulation Act, 1871)	156
35 & 36 Vict. c. 16, s. 1, sub-s. 2 (Vibration Masters and Workmen Act, 1872)	670
35 & 36 Vict. c. 76 (Coal Mines Regulation Act, 1872)	24
s. 52	482
35 & 36 Vict. c. 77 (Metalliferous Mines Regulation Act, 1872)	1, 223, 127
s. 23	225
s. 24	225
ss. 31-38	249
s. 39	225
36 & 37 Vict. c. 49 (Regulation of Railways Act, 1873)	502, 501, 501
36 & 37 Vict. c. 66, s. 25, sub-s. 6 (Judicature Act, 1873)	218
37 & 38 Vict. c. 67, s. 4 (Slaughter Houses Act, 1874)	155
38 Vict. c. 17, ss. 31-38 (Explosives Act, 1875)	227
38 & 39 Vict. c. 60, ss. 10-14 (Friendly Societies Act, 1875)	427
38 & 39 Vict. c. 55, s. 2 (Public Health Act, 1875)	226
s. 113	226
s. 150	61
s. 181	226
s. 261	261, 262
38 & 39 Vict. c. 66 (Statute Law Revision Act, 1875)	102
38 & 39 Vict. c. 20 (Employers and Workmen Act, 1875)	10, 202, 265
ss. 8, 10, 18	266, 267, 270, 278, 448
39 & 40 Vict. c. 59, s. 3 (Appellate Jurisdiction Act, 1876)	640
40 & 41 Vict. c. 50, s. 2 (Shire Courts (Scotland) Act, 1877)	258, 341, 622
c. 56, ss. 57, 58 (County Officers and Courts (Ireland) Act, 1877)	258, 385, 582
41 Vict. c. 16 (Factory and Workshop Act, 1878)	1, 181, 275
41 & 42 Vict. c. 49, s. 25 (Weights and Measures Act, 1878)	150
43 & 44 Vict. c. 42 (Employers Liability Act, 1880)	3, 7, 86, 58, 111, 123
296, 322, 399, 412, 414, 438, 604, 640, 656, 698	
s. 1	124, 203
sub-s. 1	11, 124, 156, 157, 159, 166, 172, 182, 201
sub-s. 2	11, 124, 194, 197, 204, 290
sub-s. 3	124, 158, 194, 204, 207, 209, 290
sub-s. 4	124
sub-s. 5	125, 284, 286
s. 2	125
sub-s. 1	125, 157
sub-s. 2	125, 224
sub-s. 3	126, 191, 194
s. 3	105, 196, 158, 289
s. 4	126, 260, 201, 602

Table of Statutes

lxxxi

	PAGE
43 & 44 Vict. c. 42, s. 5	127, 248
s. 6	127, 259
s. 7	128, 259, 261, 602
s. 8	129, 197, 202, 203, 234, 260, 265, 261
ss. 9, 10	130
46 Vict. No. 20 (New Zealand Employers Liability Act, 1882)	132
46 & 47 Vict. c. 52 (Bankruptcy Act, 1883), s. 37 (1)	591
49 & 50 Vict. c. 48, s. 6 (Medical Act, 1884)	678
50 & 51 Vict. c. 54 (Coal Mines Regulation Act, 1887)	225, 427
s. 4, sub-s. 2	498
s. 19, l. 8	226
l. 21	251
s. 51	226
s. 59 (2)	249
s. 70 (11)	249
50 Vict. No. 8 (New South Wales Employers Liability Act, 1886)	204, 241
50 Vict. No. 21 (Queensland Employers Liability Act, 1886)	132, 205
50 Vict. No. 894 (Victoria Employers Liability Act, 1886)	132, 208
50 & 51 Vict. c. 43 (Stammer's Act, 1887)	307, 585
50 & 51 Vict. c. 67, ss. 1, 2, 3 (Superannuation Act, 1887)	289, 817, 437
ss. 2, 4	284
51 & 52 Vict. c. 41, s. 72 (County Courts Act, 1888)	630
s. 85	253
s. 118	650
s. 120	586
s. 126	252
s. 131	641
s. 164	674
c. 59 (Expunging Laws Continuance Act, 1888)	296
c. 62 (Preferential Payments in Bankruptcy Act, 1888)	307, 584
52 & 53 Vict. c. 49, s. 1 (Arbitration Act, 1889)	336, 624
c. 57, s. 5 (Regulation of Railways Act, 1889)	152
c. 60 (Preferential Payments in Bankruptcy (Ireland) Act, 1889)	307
c. 63, s. 1, sub-s. 1 (Interpretation Act, 1889)	441
sub-s. 2	267
s. 3	249
s. 14 ...	699
s. 25	263, 601
53 & 54 Vict. No. 1087 (Victoria Employers and Employees Act, 1890)	132, 208
53 & 54 Vict. c. 39 (Partnership Act, 1890)	445
53 & 54 Vict. c. 45 (Police Act, 1890)	321, 401
c. 67 (Police (Scotland) Act, 1890)	481
54 & 55 Vict. c. 30, s. 98 (1) (Stamp Act, 1891)	589
c. 67 (Statute Law Revision Act, 1891)	102
c. 75 (Factories and Workshops Act, 1891)	161, 481
c. 76 (Public Health (London) Act, 1891)	155, 228
s. 122, sub-s. 2 (b)	155

54 & 55 Vict. No. 1219 (Victoria Employers and Employees Act, 1891) ...	182, 208
55 & 56 Vict. c. 19 (Statute Law Revision Act, 1892) ..	152
55 & 56 Vict. c. 30 (Ontario Workmen's Compensation for Injuries Act, 1892)	192, 172, 185
c. 62, s. 9 (Shop Hours Act, 1892) ..	39
56 Vict. No. 6 (New South Wales Employers Liability Amendment Act, 1892)	270
56 Vict. c. 14 (Statute Law Revision Act, 1893)	102
56 & 57 Vict. c. 63, s. 2 (Married Women's Property Act, 1893)	397
56 & 57 Vict. c. 66 (Rules Publication Act, 1893)	629
56 & 57 Vict. c. 67 (Public Authorities Protection Act, 1893)	215, 246, 247
56 & 57 Vict. c. 71, s. 56 (Sale of Goods Act, 1893)	191
57 & 58 Vict. c. 28 (Notice of Accidents Act, 1894)	238, 602
c. 56 (Statute Law Revision Act, 1894)	130
57 & 58 Vict. c. 60, s. 1 (Merchant Shipping Act, 1894)	451
s. 2 and 3	151
s. 174 (2)	618
s. 478	58
s. 502, 509	171, 393
s. 691, 695	399, 154
s. 692	114, 609
s. 696	618
s. 712	237, 152, 459
59 & 60 Vict. c. 11 (Short Titles Act, 1896)	101
c. 25 ss. 1-4 (Friendly Societies Act, 1896)	427, 582
ss. 1-7	427
s. 8, sub-s. 1	415
s. 10	435
s. 11	475
59 & 60 Vict. c. 41 (Truck Act, 1896)	274
60 & 61 Vict. c. 19 (Preferential Payments in Bankruptcy Amendment Act, 1897)	584
60 & 61 Vict. c. 37 (Workmen's Compensation Act, 1897)	1, 7, 92, 118, 240, 294, 322, 323, 411, 446, 477, 640, 648, 664, 667
s. 1, sub-s. 2	419
s. 2	678
s. 3	430
s. 4	183, 486, 491, 494, 657, 659
s. 6	694
s. 7 (3)	500
1st sch. par. (11)	685
1st sch. par. (12)	586
2nd sch. par. (13)	685
61 Vict. No. 28 (New South Wales Employers Liability Act, 1897)	182
1 Edw. VII. c. 22 (Factories and Workshops Act, 1901)	186, 181, 427, 603
s. 10	25, 89
s. 19-22	347
s. 79	226, 887, 365, 368
s. 104 (a)	250

Table of Statutes

lxxxiii

	PAGE
1 Edw. VII. c. 22, s. 105 (b)	250
s. 106 (1)	502, 507
s. 106 (c)	250
s. 107	402
s. 136	25, 249
s. 122-124	811, 856
s. 149, sub-s. 1	503
s. 156	89, 181
5 Edw. VII. c. 10 (Shipowners' Negligence (Remedies) Act, 1905)	700, 701
s. 1	701
s. 11	701
5 Edw. VII. c. 18 (Unemployed Workmen Act, 1905) s. 1 (1) (d), (3), (7)	448
6 Edw. VII. c. 48, s. 34 (Merchant Shipping Act, 1906)	552, 593
s. 39 (2)	450
s. 71	451
6 Edw. VII. c. 53 (Notice of Accidents Act, 1906) s. 5 (1)	602, 603
6 Edw. VII. c. 58 (Workmen's Compensation Act, 1906)	209-824
1st sch.	125-135
2nd sch.	335-343
8 Edw. VII. c. 7 (Fatal Accidents (Damages) Act, 1908)	114
8 Edw. VII. c. 39, s. 1 (Endowed Schools (Masters) Act) 1908	450

CORRIGENDA ET ADDENDA.

- Page 11, n. (a), for "Ogden" read "Ogdons."
 " 11, n. (a), for "106" read "109"
 " 27, n. (c), for "Griffith" read "Griffiths."
 " 29, add note to Tarry v. Ashton, "Palmer v. Bateman [1906], 2
 I R 323."
 " 40, n. (b), for "O'Byrne" read "O'Byrne" twice
 " 50, n. (d), line 3, after "352" add "in C of A 1908", 2 K. B. 825."
 " 59, n. (c), for "Cook" read "Cooke"
 " 84, n. (c), line 9, for "36" read "35"
 " 106, n. line 2, for "Nichalls" read "Nickalls"
 " 108, n. (b), line 15, for "Wail" read "Tisill."
 " 110, n. (b), " 11, for "Johnson" read "Johnston"
 " 115, n. (b), " 1, for "Barnot" read "Barnett."
 " 116, n. (a), " 7, for "Steward" read "Stewart."
 " 183, n. (d), for "Nicolson" read "Nicholson"
 " 182, n. (a), for "1839" read "1889."
 " 163, n. (f), line 6, for "Michell" read "Mikell."
 " 166, n. (a), " 11, delete "54"
 " 171, n. (e), for "Pritchard" read "Pritchard."
 " 171, n. (f), line 8, for "Cowden Heath" read "Cowdenbeath"
 " 180, line 2 from bottom of text, for "Thomson" read "Thompson."
 " 185, n. line 4, for "Gilecrest" read "Furness"
 " 207, n. (d), delete "10," and for "350" read "359"
 " 223, n. (d), for "Gimson" read "Gimson."
 " 246, n. (b), line 15, for "Fulham" read "Fulham."
 " 246, n. (b), " 29, add "in H. of L., [1907] A. C. 351."
 " 251, n. (b), from "Betts" delete the "s"
 " 252, line 13, for "Potter" read "Potter"
 " 253, n. (d), line 2, for "M'Avory" read "MoAvoy."
 " 254, n. (e), from "Betts" delete the "s."
 " 265, n. (b), line 2, for "Killy" read "Keily."
 " 448, n. (b), line 8, for "Times newspaper, 28th Nov., 1908," read "25
 T. L. R. 102."
 " 459, n. (c), line 2, for "Times new-paper, 28th Nov., 1908," read "25
 T. L. R. 103."

PART I

EMPLOYERS' LIABILITY AT COMMON LAW

INDEX TO CONTENTS.

ABORTIVE ACTION	Page
causes of	163
ABUSE	191
(See also "Workmen's")	
ACT PLANT (or) COMPENSATION	540
purchasing evidence of agreement	
ACCIDENT	
defined	16, 316, 317
secondary meaning	17
legal effect of loss of manhood from	19
spatial control from nature	19
through term "fatalities"	20
through cheap method of work	27, 33
extraordinary	50, 60
from fire works	51
not reasonably to be foreseen important liability	10
from unknown possibilities of loss	50, 60
not defined under Workmen's Compensation Act, 1906	316
Lord Macaulay's interpretation	316
unlucky	317
whether injury by disease or injury by accident	318
where effect of, not immediate	191, 329
accelerating death from pre-existing disease	330
acceleration of mortality from disease	330
apoplexy after accident	331
inhalation of saw dust	332
heart stroke	333
industrial disease	165-308
insurance of and in course of employment under 1906 Act	309
(And see "Administration of Justice" course of the L. PROGRAMS)	
notice of, not exercise of "option" of remedy	
while leaving mine	372
in transit to or from work	371, 380
occurrence of adjacent premises, effect of	377
during temporary absence	388
arising out of course external to employment	390
to substantial loss of man	381
employer's policy not against accident, within Stamp Act, 1891,	
s. 38 (1)	389
nature of, under Workmen's Act, 1906	600
compared with Employers Liability Act, 1880	601

ACCIDENT - <i>continued</i>	Page
notice of, effect of, Notice of Accidents Acts	602
why notice should be given	601
onus of proving independent not prejudicial	605
Notice of Accident Acts, 1891 and 1906	602
notice to be given by employer	602
workman having given notice of, to submit to examination if required	606
ACCORD AND SATISFACTION -	
pleaded to claim under Lord Campbell's Act	116, 118
ACT	
verbal acts	108
ACT OF GOD	
included in accident	16
longe tempore in tempore	51
long	51
local principle limited by the phrase	66
ACT OF SEDUCTION	
applied to for sale of land	329
directions to be sent to the coroner	502
ACTS	
under Employer Liability Act, if they tend	51
consolidation of action under Act of 1891	220
verbal acts of those, under W.C. Act, 1906	116
violation in proceeding under the W.C. Act, 1906 after	
misce-bellation	117
acts of abortion	654
employer's intent of, from it, however	687
ACTS OF PARLIAMENT	
construction of	362
ADULTERATE DIVISION	
no jurisdiction to <i>act</i> under Lord Campbell's Act	118
ADVOCATES -	
who may appear at arbitration	629
AGG.	
not a ground of diminished compensation	566
AGGENT	
not a servant	12
not under obligation to commit a tort	13 n (6)
cooperating with another to produce the offence	64
may render his principal liable by his fraud	155
or crime	155, 160
AGREEMENT	
contracting out of benefit of statutory protection	35
compensation paid under	515, 516, 520
to new compensation valid	573
AMBIGUITY -	
in words of Act of Parliament	360

<i>Index</i>	<i>PAGES</i>
AMENDMENT of notice of action County Court Judge, power of	100 200 203
AMOUNT OF COMPENSATION	518
ANKYLOSOMIASIS described	346
ANNUITY paid base of through Post Office how to be estimated workman permanently injured entitled to	504 504 504, 506
ANSWER objection of no claim, to be taken to	617
ANTHRAX described under Act	197
APPLICANT— supravictim after accident	101
APPEAL Court of Appeal—jurisdiction in question of first only to Court of Appeal under W. L. Act, 1906 refusal to take notice to House of Lords in Scotch cases	615 618 619 602
APPLICABLE right to appeal rules for default of	629 633 633
"APPLICANT" who is	619
APPROPRIATION— of damages—amount dependent may be admitted to calculation	629 629
APPRENTICE commenced, under Employer's Liability Act, 1902, described wages of rule of compensation to	539 541 541
APPRENTICE TO SLAVE SERVICE not within the Employer's Liability Act, 1902 within W. L. Act, 1906	567 508, 509, 511
APPRENTICESHIP loss of ability, damages of contribution, and amount of compensation under W. L. Act, 1906	571
ARBITRATION scheduled to to determine where disease is gradually contracted appeal to the House of Lords	315 304 311

ARBITRATION <i>continued</i>	
review of weekly payments by	574
programmatic to	600
notice of	601
no limitation of time for request for	608
employer may demand	609
request for a sufficient claim	613
request for, and who is to make	619
applicant	619
respondent	619
synopsis of procedure in	619, 622
application for	621
matters that may be submitted to	622
on review	622
various descriptions of	621
procedure of committee	624, 626
by substitute for County Court Judge	623
various descriptions of arbitrators	623
Committee of Conciliation	624
Arbitration Act 1887 not to apply	624, 641
without formalities	624
objection to arbitrator	626
evidence in	629
appeal case in of any person for any other person	630
rules as to	630
procedure prescribed by rule	631
may be tried pending trial	631
if submission to arbitration is made	631
discretion of arbitrator	631
refusal of judge to order arbitration	630, 674
as stated by arbitrator appeal to Court of Appeal	631
revocation of	631
cost of <i>See Costs</i>	632
in <i>formal papers</i>	637
refusal, not condition precedent to, of County Court Judge	
jurisdiction	670
transfer of proceedings	671
ARBITRATOR	
functions of, in determining questions of reason and unfair	
misconduct	600
may submit question to County Court Judge	602, 637, 631
discretion of, unlimited in case of partial dependency	617
has no power to limit statutory right	682
may force workman to proceed on application of employer	682
death, refusal or inability to act	637, 623
who may be	623
committee is	624, 626
bound by rules of evidence	629
County Court Judges	629
payment of	636
may correct clerical mistakes, or error in award	638
appeal may be stated by	641
ARTIFICER	
defined	274
distinguished from labourer	274, 275

ABISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT	1361
under Act of 1906	361
each party for its own contribution	361
one on application	361
whether to be taken, question of fact	361
principles of	362
injuries sustained while going to work	364
voluntary going to work	364
duty to report before leaving work	364
infringement of	364
workman's going to work on his own	364
actual going to work necessary	364
nature of accident connected to the employment	364
criteria	364
AS FAR AS POSSIBLE —	602
meaning of	602
ASSESSORS	
appointment of, under Employer's Liability Act	125
ASSIGNMENT	
weekly payments under W. G. Act, 1906 not subject to	361, 362
AUTHORITY	
(See MISCELLANEOUS, Section Authority, and SCOTLAND, Section Authority)	
scope of	111
AVERAGE WEEKLY EARNINGS	
how calculated under Act of 1906	369
Proctor's Method applied to	369
how computed	369
method of intermittent employment	369
Effect of Board's view of	369
Scottish view of	369
criteria of	369
comparison of with	369, 370
Board's method — definition of	370
new method of computing	370
"employment by same employer" defined	370
"single"	370
"continuous contracts"	370, 371
new method of	371, 372
AWARD	
enforcement of	626
accidental death compensation	633
of costs	639
certificate of judge to have effect of	655
judge's certificate with respect to	655
registration of	655
no court fees payable in respect of any proceedings prior to	655
certified copy of	655
BALANCE OF WAGES	
workman claiming under W. G. Act, 1906, not entitled to	381
B E L	

BANKRUPTCY	Page
compensation for workmen in case of employers, under W. C. Act, 1906	252
procedure as to masters under employers'	253
of employer when no insurance	260
procedure in land employ, where	267
BAR TO COMMON LAW PROCEEDINGS	122
BASTARD -	
child, ab-	167
within W. C. Act, 1906	163
BLAT HANGING OR KNELL	119
BLASTING WORK	
in de cille carried out	23
BLOOD POISONING	
resulting from accident - of employer's contract	180
BOARD AND LOUVERS	
may be included in repairs	513, 572
BOOKS, PAID	
not on, in or about a railway under W. C. Act, 1906	302
BORROWED	
thing by workman on his own account, not plant	1-1
BOY	
chaining machine in to wheels and to the - in mine	374, 486
in a mine	487
wages of, given to parent	470
BREACH OF PROMISE	
of accident by complainant	307
of criminal willful misconduct on defendant	367
CRIMINAL OFFENCES	
under Land Compensation Act, not recoverable	1011 (b) and
under W. C. Act, 1906	301, 379
BUSINESS	
in mining, under W. C. Act, 1906	159
BUTTY MEN	
workmen	217
miners under	276
BY-LAWS	
at common law	221
under Employers' Liability Act, 1880	221
under various Statute	223
effects of	227
limitations on	227
CAB-	
horse falling into excavation	87
accident through drunken driver	55 (n)

Index

[illegible]

COMPENSATION— <i>continued</i>	page
amount of compensation	515
not to be reviewed	515
under W.C. Act 1906	515
amount, money paid as compensation	515
in view of weekly payment	515
when workman dies	516
scheme of the Act	517
in case of death when the worker is dependent	518
method of, where workman employed three or more	518
where workman employed less than three	519
how computed	521
intermittent employment	523
criminals	525
acceptance of <i>proviso</i> for the sake of agreement	530
in case of death, where worker is dependent	531
in case of death, for man independent	531
payable to the woman, when	532
where woman totally incapacitated	532
partial incapacity	533
money without the pension	534
money, workman and	534
in case of weekly payment	534
duration of liability	535
old rate of minimums and	536
objection to work offered	536
apprentice injured	537
new consideration introduced by the Act	537
not part of the costs	539
right to, must be	540
workman to have employer in liability for	541
position of minor's compensations	541
in case of kind employer of employee	549
persons entitled to receive	549
infants' receipt and	552
position of women	553
discharge, necessary under Act of 1906	559
under 1906 Act (Compensation)	559
selection, then a decision for cost	552
alternative procedure for cost	553
recovered from public authorities	555
what, discontinue from liability recovered	559
COMPROMISE	
of claim, money paid in respect of	559 (b)
CONCILIATION	
Commodities	561
CONCURRENT CONTRACTS—	
when two	581, 583
contracted	587, 588
CONTRACT	
injured of, how assumed	590
employer may sue employer	593
CONSIDERATION	
in case of, when recovery is when applicable	593 (b)
of injury, what	592

CONTRACT, <i>q.v.</i>	
power of, best of who is employer	139
CORRUPTION -	
employer, when notice to, under W. C. Act, 1906	302, 601
COSTS	
of special case	135
where respondent has disclaimed any interest	612
of interrogatories	606
interrogatories dealt with	612
valuation	612, 616, 617, 618
when respondent has offered to admit to an award	611
jurisdiction of County Court and judge, as to	611
to whom may be awarded for	611
scale of	616
valuation - costs	616
<i>see also</i> <i>parties</i>	617
costs for	617, 618
frivolous	616
solomon and client	619
lien for	619
method of adjusting, where matters proceeding in relation	613
deduction of	613
payment, when concerned with	616
discontinued	616
whether recoverable under indemnity	621
COUNCIL OF CONCILIATION	
committee, whether	614
COUNSELS, 341, 418	
cost of	613
COUNTERCLAIM	
Civil Bill Court in Ireland	125
fund, invested in the name of the respondent	130, 640
defence of defence of, under W. C. Act, 1906	129, 671
application of rules of	101, 671
defence of defendant, under W. C. Act, 1906	636
jurisdiction as to cost	612
jurisdiction of generally provided	670, 671
County Court, what payable	671
lien for of proceedings in	671
COUNTERCLAIM, 119, 121	
nonmutual arbitrator	335, 630
question of law admitted to, under W. C. Act, 1906	102, 611
sub-arbitration only	629, 636, 636
which, to act	615
power of amendment of	615
nominee of how paid	636
as stated by	636
must take a note of both law and fact	640
refusing to act	640
appeal from	640
case stated to	641

[illegible]

DANGEROUS COMPOUND	page
to children, without notice	73
DANGEROUS CONDITION OF WORKS -	
inhabited, for accident arising from	22
blowing accident	23
knowledge of	26
warning from the nature of the work	28, 173
root out of repair	77 n (b)
walls and building -	173
inhabited	186
where negligence may be imputed from	196
does not preclude imputation of negligence	224 n (6)
DANGEROUS EMPLOYMENT	
imputed to	13
employer on condition	99
DANGEROUS FORCES	
one required in the line with	68
DANGEROUS OPERATION	
in yard	192
due to appendage	95
DANGEROUS WORKS	
notice to be given	19, 173
DEATH	
of cause of notice of repair	50, 500
of property of goods person	56
DEATH MAN	
duty of care to	91
DEBT	
owed by accident	101, 119
Scottish rule of damages for, owed to, accident	106 n (a)
duty of care under Canadian Act	101 n (a)
claim under Land Compensation Act limited to the loss sustained	101 n (a)
landlord entitled to recover if he has held out a contract to	109 n (6)
of wife	280
any person entitled to recover if no contract of work	117, 121
of master, claim on injured person, no dependent	182
of independent contractor, claim on injured person	177
compensation in the event of	518
person to be paid to compensate with common money for	517-520
to whom sum payable by way of redemption person	551
(See COURT SUITORS)	
DEBT	
owed to accident due to negligence	150
DEBT AND EMPLOYER	
action on condition of care under the Act of 1880	281
DEBT AND PERSON	
negligence inflicting loss on personal estate of	116

DUTY--	
defined	100
to do, not to be considered while in and	100
one deemed to be engaged while performing	100 (5)
not engaged to do, considered to	100 (6)
in providing machine	200 (6)
if employer to be stated, except from person of default	200
to be paid	200
to periodically test there, which does not require attention	200
where, without additional	200
to young person, from a Year or P. 100	200
of employer to a volunteer	100 (6)
of exemption, not to be paid	100
and in the, exemption of employer	100
to a person, not to be paid	200 (6)
violation of, when, not to be paid	100
more to the, made of, when, not to be paid, not to be paid	200
to be paid, not to be paid	200
to be paid, not to be paid	200
more to, which, not to be paid	200
rule of, person, not to be paid, not to be paid	200
rule of, person, not to be paid	100
rule of, person, not to be paid	100
distance, not to be paid, not to be paid, not to be paid	200 (6)
of one, person, not to be paid	200 (6)
to be paid, person, not to be paid	200
to be paid, person, not to be paid, not to be paid	200 (6)
of person, not to be paid, not to be paid	200
volunteer, not to be paid, not to be paid	100
not to be paid	200 (6)
a, exemption, not to be paid, not to be paid	100
rule of, person, not to be paid, not to be paid, not to be paid	200 (6)
caused	200 (6)
FAIRNESS	
measure, of, person, not to be paid, not to be paid	200
rule of, person, not to be paid, not to be paid	200 (6)
distance, not to be paid, not to be paid	200
distance, not to be paid	200
distance, not to be paid	200
distance, not to be paid	200
distance, not to be paid	200
EFFICIENCY AND SKILL	
operation of, person, not to be paid, not to be paid	200 (6)
(See Efficiency and Skill, not to be paid)	
ELECTIONS OF BLM (B)	
(See Efficiency and Skill, not to be paid)	100 (6)
ELIGIBILITY	
rule of, person, not to be paid, not to be paid	200
rule of, person, not to be paid	200
EMPLOY	
defined	100

EMPLOYER	Page
new duties imposed on	3
employer's action against workmen	1
period meaning of the term	9
inclusion of, to constitute	11, 281
common employment	13
general duty of	19
not liable for ordinary risk	20
to furnish tools and machinery reasonably fit	20
not liable for risks attributable to the work	20
liable for personal default	21
liable for partner's default	22
vicarious responsibility	22
personal default of, when	22
liability of, for incompetency of servant	23
workmen with workmen	23
liable for deficient supervision	23
liable for withholding information of dangerous property of	27
themselves with	27
settling, contracts with an efficient	27
must provide accurate information concerning a plant	28
not liable for neglect of workmen once apparatus supplied	28
not liable for machinery or fittings labelled as competent workmen	28
product liability, product	29
duty of, where contract is made prior to Statute (Quinn v. Leeson)	33
duty of, to control person	39
not liable for injury received through common employment	41
liable for violation of other employee's cooperation in the same work	42
not liable for workman of contractor for negligence	43
duty to volunteer	45
defined under Employer's Liability Act, 1880	129, 266
service of	135
control by	139
test to determine who is	139
only, liable for act, within the scope of employment	141
delegation, authority	230
mutual	280
deceased	281
innate	282
Crown	282
not liable for contractor's act or workman	281
consequence against	292
defined under Workmen's Act, 1906	319, 176
not liable both independent of and also under Act of 1880, nor under Act of 1906	112, 155
liability of, for partner	113
who the member of family of	162
who is, under Workmen's Act, 1906	177
new principle under Workmen's Act, 1906	177
presumption when servant is lost	178, 179
Crown is	179
when a contractor, position under Act of 1906	179
insurance and insolvency of	589
position of, when bankrupt, as regards compensation to injured workmen	582, 583
procedure as to insurers under bankruptcy of	583
policy of insurance against accident stamp for	589

EMPLOYER—*continued*

bankruptcy, where no insurance	1561
notice of injury, cited on under W. C. A., 1908	201
maximum indemnity under Workmen's Compensation Act	600
power	601
defences of	697
•	
• (See Workmen's)	

EMPLOYER AND WORKMAN—
(See MASTER AND SERVANT)

EMPLOYERS LIABILITY ACTS—

passage of, in the development of the law	1
cause of litigation, leading to	1561
contracting out of (Contractors out of)	52
rule, possible and not otherwise	123
object of Act	123, 131
definition	129
maximum principle of	131
scope of the employer	135
scope of employment	141
defects in the condition	146, 165
in the case of employer	150
ways	16
work	155
machines	150
plant	141
connected with or related to the business of the employer	147
contributory negligence	195
• (See also Defences, when liability is excluded)	
• (See also Negligence)	
reasonable time	193
notice of defect	191
superiority	196
negligence in superintendence	196
negligence in construction, in order	99
order of direction	99
employer's liability in construction	201
loss, loss	201
•	
period of limitation	201
limit of compensation and	215
when contract is not covered by contract	229
compensation, how estimated	200
reduction in limit of compensation	211
voluntary payment	211
time limit	212
notice	212
penalty clause, by order of the court	215
trial of action	221
notice of refusal to proceed with	229
defect in machinery and	260
result of workmen's loss	260
effect of upon liability for injury caused by wilful act	111
•	
• compared as to liability with Workmen's Compensation Act, 1908	138
•	
• compared as to notice with W. C. A., 1908	601

EMPLOYMENT

accident, in regard to, under the course of	329
question of fact	371

EMPLOYMENT— <i>continued</i>	1601
what is "out of mid in the course of"	372
comes to, in a way forbidden	371
"conflict of employment"	377
on adjacent premises	377
full work in	391
causal	401, 520
need for proper proof of employment in order to recover	140
for the standard period	520
information	521
in continuous	521
for less than a year	525
"actual"	530
under Workmen's Compensation Act, 1906, and under the same employment	537, 538
order of evidence of employment	537, 538
(See SCOTT on EMPLOYMENT)	
ENGINE DRIVER	
locomotive	371
EMPLOYER ON SHAMER—	
not within New South Wales Employers' Liability Act	270
EMPLOYING WORK	
continuation of, "in, on, or about"	500
EMPLOYEE—FEE	
occasional full	142
ESTOPPEL—	
wrongly alleged	151
admission of negligence	617
EXHIBIT	
affirmative benefit—rule of	629
EXHIBIT NOT OF NECESSARY	
non-adoption of presumption	19
adoption of new presumption	19 n (9)
in case of misapprehension of content	21
in case of misapprehension of content—where it is to be taken into	20 n
Statute	20 n
presumption of knowledge of deposit	32
where would not be on duty for employment	38
where it is impossible to apprehend	38
where it is not possible to apprehend	38
previous accident at the same place and in similar manner	60 n (1)
injury	60 n (1)
injury—where it raises a presumption of causality for purposes	61 n (6)
for which it is used	61 n (6)
injury	72, 73, 74
what <i>causal</i> is	71
reasonable	71
fact of happening of accident	71 n (6)
where <i>causal</i> on defendant	73 n (6)
causal balanced evidence	76
where service is gratuitous	77
must be well defined	78
some specific act	78
scrutiny not sufficient	78 n (a)

EVIDENCE OF NEGLIGENCE *continued*

"reasonable"	1561
must raise a probability of negligence	780 (6), 801
in not discharging duty to employer	801
when duty to general public	801 (6), 811
where voluntary act is imputed	811
presumption against one determining cause	811
for the jury	812
must be directly connected with the accident	813
where conflicting effect for the jury	821, 816
where self-destructive	813
proof of, proximate contribution to negligence	801, 811
defect in the condition of thing when	810
infringed	807
dangerous state of work or method	813 (6), 811

EXAMINATION

by medical man	1670
workman cannot impose form on it	1670
employer may require workman to	1670
obey instructions	1670
demanding, in absence of hazard	1671
public duty order	1670
how far certificate conclusive	1670

EXEMPTION

unlimited	870 (6), 871
-----------	--------------

EXTINCTION

under W. C. Act, 1906	1660
-----------------------	------

EXISTING CONTRACTS

provision as to	122, 141, 150
-----------------	---------------

EXPLENSES

out of wage deduction as	111, 113
maximum	111
limited	109, 113
recovery of	111

FAMILY

who are members of employer	162
for contributory negligence of	160

FATAL ACCIDENTS ACT

(See COMPENSATION ACT)

FATHER—

rights of, as an employer of child in domestic employment	140
right of, to recover for negligence in, death of child	140

FAULT

when presumed	51
(See CARE, DUTY, NEGLIGENCE, and NEGLIGENCE)	51

FEES—

none payable in County Court under W. C. Act, 1906, prior to award	1670
--	------

B E L 310

FELLOW-SERVANTS -	page
defined	14
who are	11 and 14
neglect of duty by, a risk of the employment	14
injury by, tort—appliance—provided is a risk of the employment	28
cooperation in work at the same place and time for a common result	12
who are not	13
FENCES	
duty to, machinery	24
FINS	
not affected by W. C. Act, 1906	30, 327
(See CHAMBERS and PRINCIPAL)	
FIREMAN	
outside New South Wales Employer Liability Act	200
FIRST CHARGE	
workman to take, on money due from master	307, 384
FLOOD	
portion of crops	531
FEDERAL EMPLOYER	
position of, under Act of 1906	179
FORFEITURE SAVER	
law for, within W. C. Act, 1906	153
FORTHING WORKMAN	
position of, under Act of 1906	180
FORMS	
under Employer Liability Act, 1880	107
W. C. Act, 1906, sub. 100c	767
1906	791
under Regulations as to Medical Relief	875
by Registrar of Friendly Societies	886
FRAUD	
money indemnity—Discretion of W. C. Act, 1906, not compulsory unless in writing	158
FRIENDLY SOCIETIES ACT	
provisions of, applicable to	127
requirements of Registration	128
form of Regulations Committee	132
duration of certificate	133
FRICTION	
effect of, a cause of damage	94
(See ACCIDENTS)	
FULL WAGES	
and 'average weekly earnings' discriminated	302

Index

923

MINERAL EXPENSES
under Landrum-Johnson Act of 1906
how provided for under W. C. Act of 1906
when may recover

106
106
106
106

RISE
from, when crop and oil are sold

111

GANGSTER—
who is

200 n 90

GARDNER
a moral servant

97

GAS EXPLOSION
caused by employee not in line of employment
death of person not in line of employment
caused by employee not in line of employment

24
24
24

GOVERNMENT DOCKYARDS
compensation

81

GOVERNMENT EMPLOYEES
under Landrum-Johnson Act of 1906
under W. C. Act of 1906

24
117

GRADIENT
measured, under W. C. Act of 1906

157

GRANDCHILD—
entitled to dependent

101-102

GRATUITIES
to be brought into account under Act of 1906

111

GRIEF
in loss of, on premises

201

HAIRBRUSH—
not a workman engaged in manual labor

102

HANDICAPPED MAN
disqualified from work
defined

75
256

HEAD CONTRACTOR
liability of
(See PERSONS)

105, 141

HEAT STROKE
death through

353

HIGHWAY	page
passenger injured by fall of something from house	46
partly covered with ice	65
wa-hu, 'van on	66, 70
hine 'indash in	66
water - 'poome on	64
<i>his ipse 'ipitau</i> does not apply to accident on	75 n
obstruction in	85
private individual not to not decide nuisance on, of his own	89 n (a)
author	
HIRE	
of plant	181
HOBARDING	
negligently executed	50 n (a)
illegally executed	50 n (a)
HOLDING	
effect of holding on compensation	53a
HOLISK	
violin	34
stopping, runaway	17 n (b)
by-hung on, and injure man	51
shipping on ice on hold in	65
frightened	67
holding	73
unattended	74
runaway, find one down dead person	76
died from sudden fright	84 n (a)
injured while being held out of new-	87 n (b)
violin, may be plant, and so within Employee's Liability Act,	180
1880	
HOTEL	
not on, in, or about under 1, under W. C. Act 1906	40
HOLSK	
formed by holding	4
HOLSK, OF HOLSK	
appeal to from Scotland	702
HOLD	
on highway	65
hot - shipping on	66
HOLDING, CHIEF	
within W. C. Act, 1906	40
character of dependence of	109
ILLITERATE PERSON	
particulars and request for information by	122
IMMEDIATELY	
signification of	67 n (a), 71 n (a)

[illegible]

INJURY	346d
for which compensation is payable	49
resulting from conforming to order	297
service of notice of, under Employers' Liability Act, 1880	250, 252
by accident	316
without negligence	559
service of notice of, under W. C. Act, 1906	600
INSTRUCTION	
duty of	26, 77 n [9]
INVESTMENT ACT	
no liability for	52
does not entitle for recovery of interest on deposits	91
INSURANCE	
non-acceptance of contract to be taken into account as to	
returning compensation if contract law	111
under Lord Campbell's Act, in relation to death common law rule	111
insurance employee under W. C. Act, 1906, and in insurance money	582
workmen to be compensated under Act	583
workmen to be compensated in the insurance	584
employee under Act, in connection with the insurance company	584
proceeding under contract of insurance under Act	586
decision appeal to Privy Council	586
application of workmen to, under	586
right of insurance company	586
condition of contract to be	587
not applicable to insurance contract accident within section 15	
of Stamp Act, 1901	589
INTERMITTENT EMPLOYMENT	158
(See also Intermittent)	
INTERPRETATION	
of words of an Act of Parliament	362
rule where words are ambiguous	362
INTERPRETATIONS	
power to give leave to be taken under W. C. Act, 1906	616
cost of	616
INVESTMENT	
of compensation under the W. C. Act, 1906	581
of children's share in award against widow	581
INVIOLATION—	
on premises, no concealment of	97
(See also Concealment)	
INVOLUNTARY ACT	
and negligence	91
IRRELEVANT	
Civil Bill Court in Employers' Liability Act, 1880	128
provisions as to application of W. C. Act, 1906, to	315, 582
money on deposit in Post Office Savings Bank in	335
application of terms in schedule to	312

Index

027

IRRELEVANT NEGLIGENCE

166
283

JOINT WORKERS

- liable for the whole injury 61
- rule of contribution between 100, 101
- interim and eventual when 101
- liability of 100

(See Also Contribution)

JOE BENJAMIN

- death 271
- discharge from liability 271

(See Workers' Compensation)

JOINT TENANT

- joint two defendant under Employer's Liability Act 100
- rule of common law between 100, 101
- liability of 100, 101

JOINT EMPLOYERS

- warden and police 100

JOINT RESPONSIBILITY FOR NEGLIGENCE

170

JURY

- case tried by color of police liability Act 180
- not summoned under Workers' Compensation Act 100

171
121

KILGUS WOMAN

- in one case to include a common liability 271

KNOWLEDGE

- of defendant incident of 100 99
- when 100 101
- when presumed to be common 101
- when presumed 101
- when, with full appearance of a common 101
- more of, more of 101
- amount of required to be common 101
- of defendant not in the case 101
- when peculiar within the power of the person 101
- of defect when 101
- when a common 101
- discharge from liability 101
- that is not bound to inform 101, 102

LABOR REL UNDER EMPLOYERS LIABILITY ACT 1880

- defined 208, 272
- not confined to master and discharge 208
- test of 71

(See Workers' Compensation)

LAPID B

- borrowed by workman, his own accident, not permitted under Employer's Liability Act 1880 181

LATENT DEFECTS

- in machinery 177

LEGAL PERSONS	940
and subject, membership of, under W. C. Act, 1906	556, 565, 566
(Great Britain and Ireland)	
LEGAL PERSONS	
of, water company	61
LEAVE TO ABSENDE	
claim for compensation	63
LEGAL PERSONAL REPRESENTATIVE	
under Lord Campbell's Act	105, 280
who is under Employer-Liability Act, 1880	280
"and minor" includes	280, 302, 379
of sole dependent	379
in case of workman's death payment to be made to	379
compensation paid by, not part of the estate	379
payment of, may award of compensation to	379
may take particulars of dependent, in respect for arbitration	320
LEADING WORKMAN	179, 178
LEAFLET	
to be used	262
not to be used	263
evidence of process	264
in different order	263
LIABILITY	
declaration of	361
may be submitted for arbitration	622
LIENS	
duties to	77
right of, on tenement	292
mortgage, rights of	294
LITIGATION	
for cost, under W. C. Act, 1906, non-	310
unless awarded	622
LIQUID EMPLOYMENT	
offer of, to workman	669
LIQUIDATION	
descriptive, law of	51
LIMIT OF COMPENSATION	
under Employer-Liability Act, 1880	234
under W. C. Act, 1906	138, 552
LIQUIDATION	
what is	234
LIQUIDATION	
board and holding	53
LORD CAMPBELL'S ACT	
see Campbell's (Lord) Act	

1924

LEAFLET MACHINERY	204
signature, and emblem on plain machine	204
marked number	204
LEAFLET	10
Ames paid into Court on a count of non-appearing	10
LEGAL EMPLOYER	252
when liable under Employers' Liability Act, 1880	252
MAINTENANCE	91
duty of employer to provide for	91
insufficient	91
personal default of employer to respect of	22
tribunal's duty to find, no defect	91
claimant's duty to prove from which accident or disease	91
causal of injury, defect or default	91
failure to attend doctor's, or to seek advice of medical officer	91
defective, though hidden defect, operation	91
improper, when employer not liable for	91
determination of	91
presence of hidden defect, not to be	91
necessity to improve the condition of	91
defective machinery of road	91
not from open and palpable	91
defect subsequently repaired	91
same person, not of one	91
properly observed	91
child, injured by	91
quantity, prevention of, not possible, defect in the condition of	91
defective machinery to correct	91
defects, under section of the Employers' Liability Act, 1880	91
machine, what is	91
latent defect	91
defective, or is	91
the maintenance of	91
determination of	91
poor, defect in	91
non-existence of	91
attributed to no hidden defect in	91
machines, an duty to improve, or to repair, and to prevent	91
Act, 1901	91
improved machinery, with the present view	91
claimant's liability in respect of	91
worked by mechanical power	91
MALING RING	680
where workman injured under W.C. Act, 1901	680
MANUAL LABOUR	150
distinguished from manual work	150
what is	150
engaged in, significance of word	150
under W.C. Act, 1901	150
MARGINAL NOTE	123
effect of, in interpretation of Act of Parliament	123

MASTER AND SERVANT		page
change in the relationship of		3
relation to persons outside the relation		4
action for inducing servant to break his contract		4
relation of employer and workman or master and servant con-		
sidered		5
limit of employment		10
to come work without consent		11
owner and pilot not		11 n 100
generality of master to servant		20
incompetency of servant		23
order to do a thing requiring extraordinary care and skill		50
reciprocity of the relation		112
relation to terms of relation of		119
contract of		112
results of master's care, negligence		115
to do for the purpose of the master's relation		115 n 113
to do things which could be done by others		118
willful act done on the master's account		119
which could not be done by anyone else		119
willful to pierce		120
contract of employment		120
contract of		121
act not to do but to do done by servant		122
contract to employ without knowledge of parties		123
implied authority of servant to protect property		123
injured person cannot recover additional compensation if not		
both		124
master not generally criminally liable for act of servant		125
able to help by giving when master is responsible for		125 n 126
MASTER OF SHIP		126
within V. C. Act, 1902		126
MASTERS—		
to be paid wages, master to servant		101, 206
to be paid wages, master to servant		129
to be paid wages, master to servant		20
to be paid wages, master to servant		52
to be paid wages, master to servant		105
to be paid wages, master to servant		111 n 61
to be paid wages, master to servant		67
to be paid wages, master to servant		610
to be paid wages, master to servant		291, 129
to be paid wages, master to servant		81
to be paid wages, master to servant		119
to be paid wages, master to servant		126
to be paid wages, master to servant		11
to be paid wages, master to servant		119
to be paid wages, master to servant		129
to be paid wages, master to servant		71
to be paid wages, master to servant		35
to be paid wages, master to servant		63 n 64
to be paid wages, master to servant		63 n 64
to be paid wages, master to servant		113
to be paid wages, master to servant		127
to be paid wages, master to servant		37

Index

431

[illegible]

MINER	
object from defendant's	903, 906
on motion	907
MINOR	
opening date, temporary light duty	116
on time	269
duration of temporary absence	276
on the record	303
minimum liability for collection of employee compensation	323, 341
MINIMUM COMPENSATION	68
MINOR	
medical attendance of	31
	(See Young, Patricia)
MISCONDUCT	
crime and victim	69, 70, 71
	(See Stephens, William M.)
MISTAKE	
injury of accident under Employer's Liability Act	290
defect or omission, no notice occasioned by failure to correct	114
from the road	618, 699
power to correct in certain cases	618, 699
MONKEY PATH INDICATOR	141
MONKEY BILL	
exact liability for	31
MONKEY	
how computed	21, 106, 108
MOTHER	
dependant	621
NATURAL AND PROBABLE CONSEQUENCES	
of act	352
Negligence	
defined	68, 19
contributor, who is not defendant	25, 11
omission or participation, proportion when	25, 11
discovery, limitation	19
notion of, and of, contributory	50
where extraordinary care is required to do work efficiently	50
in the same degree	50
in the same manner	50
liability for, how founded on	51
instructive and does not limit liability for the consequences as if	51
voluntary act not	51
responsibility for, implies a personal act	51
child throwing stones	52
of coach proprietor in providing coaches and	52
liability for, where uninterrupted sequence between act and	52
consequence	52

Model 1612(1) — <i>continued</i>	
in employee's incompetent person	650
in malice or premeditation	651
how consequences of negligent act may be avoided	651(1)
may be a right to be negligent	651
presupposes duty	651
duty to file claim when an employee	651
lack of foresight when	651
Water Company when pipe laid too high for	651
rule of duty in ordinary cases	652
rule of duty in special cases	652
rule of duty in case of property adjacent to highway	652(1)
resisting the agent	652
joint wrongdoer	652
infringement of copyright in literary work, design	652
placard in fire alarm	652
act of food for a horse	652
limit of liability for	652
consequences of loss for tortfeasor	652(1)
in employee's mind	652
consequence	652
joint liability for	652
rule determining the extent of liability for	652(1)
defective work	652
in common law	652(1)
in physical destruction	652
case of physical	652
immediately connected with pipe	652(1)
rule proposed when	652
rule of duty of the defendant and the	652
defendant equally responsible for the act of the defendant	652
not immediately applicable to the act of the defendant	652
in determining liability for	652
conduct of	652
in permission to use the equipment	652
will be denied	652
effect of the negligence of the	652
defendant on the liability of the	652
effect of contributory negligence	652
but not if the defendant is the plaintiff	652
action for	652
on a claim for contribution of the defendant to the act of the	652
action for the defendant's contribution to the act of the defendant	652
Act	652
can the defendant be held liable for the act of the	652
in malice or premeditation	652
in particular case of the defendant	652
of employer under Act of Employer Liability Act 1897	652
necessary element to entitle to recover	652
infringement of the defendant's method of work	652
of servant in case of employment of	652
out, for the purpose of the defendant's	652
in continuing to employ	652
presumption of negligence by the defendant's	652
rule under W. L. Act, 1906	652
agency case of law, if employee under W. L. Act, 1906	652
of subcontractor in common law	652
act of subcontractor under W. L. Act, 1906	652

NEPHRITIS	page
death from, accelerated by accident	350
NERVOUS SHOCK	
when recovery may be had for damage caused by	84
NEW TRIAL	
on ground of improper estimate of damages under Employers' Liability Act, 1880	291
where damages inadequate or excessive	291
not available under W.C. Act, 1906	136
NOMINAL SUM	
award of	562, 565
NOTICE	
of defect, at common law	191
to whom given	194
under Employers' Liability Act, 1880	191
discontinued from time to time	195
of injury	279, 282
condition precedent	211
time limit of period of, necessary	211
to dead employer under Employers' Liability Act, 1880—280 (supra), 281	
under Employers' Liability Act, 1880—rescinded on account of	
employer's negligence	215
negligence of	240
defect or negligence in	260
negligence does not vitiate	261
attenuation of	261
addressed to deceased employer	260 n 601
service of	262
of the potential cause of accident or injury	219
of others, due to whom recovery under W.C. Act	261
not a proceeding in the action under W.C. Act, 1906	267
not a proceeding, unless followed by claim of compensation	607
of accident under W.C. Act, 1906	600
how served under W.C. Act, Rules, 1907	600
of injury, time and place for giving	601
absence of should be explained	605
as to medical examination	676
	(See Accidents)
NUISANCE	
a continuing wrong, not a single act of negligence	75 n
OBJECTION TO WORKMAN	
to work offered	546
OBJECTION TO CLAIM	
must be stated in answer	617, 622
OBSTRUCTION	
placing	71
OBSTRUCT	
what is to, an examination	439

Index • 935

OCCUPY	1301
duty to person coming to him on business	212
" " " as employer	212
" " " as independent contractor	212
" " " as agent	214
OFFER OF EMPLOYMENT	260, 270
OFFICE EMPLOYEES	
within W.C. Act, 1906	151
ONEROUS CONDUCTOR	
not a workman	70
ON, IN, OR ABOUT THE PREMISES	
under W.C. Act, 1906	352, 391
to be distinguished from "near"	300
"vicinity" is not a word	301
"within meaning of," "within" of only	300
ONLY	
where incompetent, not a workman	231
is to be construed of itself	31
in position of employer	0
on person of him, to recover compensation for damage	73, 340
in the case of non-employment	301, 304
proper inference of proof from "not a workman" under W.C.	345
Act, 1906	
OPTION	
not a legal necessity	115
under W.C. Act, 1906	116
to proceed under W.C. Act, 1906, in case of non-employment	116
what constitutes a contract	117, 118
limitation of	121
in relation of injury, not a contract	138
ORDERS OR DIRECTIONS	
copy of	307
"order," not a contract	391, 391
not a contract	218
not a contract, not a contract to receive	218
direct right of obedience to	291
resulting from non-employment	31
OR OTHERWISE	
in manner of	113
ORGANISE	
not within W.C. Act, 1906	150
OTHERWISE ENGAGED	
in manual labor	260, 270, 271 (a)
OUT OF AND IN THE COURSE OF EMPLOYMENT	
meaning of	360
question of fact	361, 361
though not irrelevant if no doubt as to	360
not a workman, not necessary	361
where accident occurred	360

OUTWORKER not within W. C. Act, 1906	PAGE 112, 161
"OVERTIME," a portion of the employment	529
OWNERSHIP OF TOOL USED IN A BUSINESS relevant under Employer's Liability Act, 1880	189
PARENT definition of under Lord Campbell's Act	104, 280
PARISH CLERK not a workman under W. C. Act, 1906	149
PARTIAL DEPENDENCY arbitrator's discretion unlimited funeral expenses in case of workman's death may be taken into account	547 547 553
PARTIAL DISABILITY payment during	568
PARTICULAR INSTRUCTIONS under Employer's Liability Act, 1880 obedience to, what	229 230
PARTICULAR PRECAUTION when indicated, duty to take	130
PARTICULARS delivery of objection to claim out of time, or no claim to be taken in answer to	622 622
PARTNER liability for default of not a servant	22 145
PARTNERSHIP when dissolution of, termination of service	6
PAUPER as a workman under Poor Law not within W. C. Act, 1906	113
PAYMENT during incapacity, mode of	579
PAYMENT INTO COURT	302, 632
PECUNIARY LOSS under Lord Campbell's Act reasonable expectation "pecuniary damage" (See COMPENSATION)	109 109 111 n (d)

PENALTY	1500
statutory effect of	Pen
not to be restricted except	330
when mentioned under a statute in evidence of breach of	
contract of hire	62
detached labor compensation under contract of hire Act	
• 1880 in common law	238
• under statute	191
contributory negligence not a bar to common law	240
waived in discharge, when	240
action at common law	240
imposed on master and common Bond Act, when it does	330, 332
the W. C. Act 1906	
PERMANENT INJURY	107, 109
PERSONAL AGENT	
who has been hired	62
PERSONAL DETAIL	
of employee	62
PERSONAL INJURY	
they understood by law	19
to accident	191
PERSONAL REPRESENTATIVE	
may not be assigned property interest in	107, 102, 103
where direct employer liable Act 1880	180
under Federal Employers' Act	190
under W. C. Act 1906	120
PHOTOGRAPHERS	106
PLAY OF TRAIL	106
PLAY	
motion picture company	100, 101
publicly exposed to	101
law of negligence, applying to motion picture company	
Federal Act 1906	100
negligence, picture company liable	101
PLANET	
employee's responsibility for property damage	100, 101
employee's responsibility for	101
property which is damaged	101
under Employer's Liability Act 1906	101, 102
detached	182
in common law	182
workers	182
trip held in road not faulted on, prohibited, not	182, 181
must be the employee's responsibility to be held	181
under common law	181
under Motor Vehicle Act	
POINTS	
upon railroad	241
POULDBERMAN	
not within W. C. Act 1906	112, 100
REEL	330

Index

PRODUCTION OF DOCUMENTS
in product computer

929

166
621

PROXIMATE CAUSE
when
• determination of term

600 (1)
600 (1)

QUARRY
• distinction between mine

97

QUARRYMAN
• contract with

116

RAILWAY
• • definition of, in Employer's Liability Act, 1900

54

RAILWAY SERVANT
• • in Employer's Liability Act, 1900

231, 266

REASONABLE
• existence of negligence
• • probability of injury to each
• • fact
• • provided and "in the ordinary course of employment" (see COURT CASES)

164 (1)
164
144 (1)
144 (1)

REASONABLE TIME
when

100 (1)

RECEIPT
• • check of return
• • evidence
• • • • • when return made, &c. (see INDEX)

116
142
14

RECEIVED ORDER
• • • • • when order made

181

REDEMPTION
• • • • • at computer (for index see COURT CASES)
• • • • • when it may be exercised, &c. (see INDEX)
• • • • • when pooled by Act, &c. (see INDEX)
• • • • • when redemption may be applied for, &c. (see INDEX)

17 (1)
17
14
14

REFRESHMENT
• • • • • not on, or for, or about railway, under W. Act, 1900

102

REGISTER
• • • • • keeping of
• • • • • published, &c.

123
164

REGISTERED LETTER
• • • • • service of notice by

262

INDEX	Index	
REGISTRAR OF COUNTY COURT	passim	
in Scotland	332	
duties of	337, 371, 440	
to record memorandums under the W.C. Act, 1906	418	
REGISTRAR OF FRIENDLY SOCIETIES		
accepted, definition	385	
to certify contributions out of W.C. Act, 1906	425, 428	
form of certificate of	432	
duration of certificate	433	
to certify scheme by Local	437	
REGISTRATION		
of memorandum	660	
of award	662	
(see also below)		
REMITTANCE WARRANTS		
mode of recovery	292	
RENT		
effect of payment when received immediately on payment of	520, 529	
RENTAL RATIO		
persons with less than 20 persons within W.C. Act, 1906	44, 45	
RESCUATION		
of bodies liable under W.C. Act, 1906	441	
RESPONSE STATEMENTS		
of parties to arbitration	629	
RESPONSE STATEMENTS BY PARTIES		
of persons appearing before arbitrator	37	
REQUIREMENTS OF ARBITRATION		
to be made by	61	
as to form of agreement, to be made when it is made	613	
as to jurisdiction	619, 620	
as to jurisdiction	622	
as to jurisdiction	622	
RISK (See <i>Liability</i>)		
does not apply to corporations, or to the law	700	
RISK (See <i>Liability</i>)		
what	256	
RISK (See <i>Liability</i>)		
what	629	
RISK (See <i>Liability</i>)		
what	62	
RISK (See <i>Liability</i>)		
what	223	
RISK (See <i>Liability</i>)		
what	69, 702	

Index

911

REVIEW	913
of amount awarded	913
not necessary by arbitration	913
change in contract time before	913
arbitration may require intervention of arbitration of	913
mediator	913
RIGHTS	913
conflict of duty (C.D.U.)	913
to be resolved	913
RISKS	913
what are to be considered, in fact	913
that are inherent in the employment	913
the employer is to be employed in the same way as the	913
of the contract	913
there is a possibility from the fact	913
that, as a result of the contract	913
the employer	913
there is a possibility to be employed	913
do	913
obtain	913
ROOM	913
whether or not it is a room	913
RIGHTS	913
to C.A.A., P.W.	913
rights of the	913
to check a room of the contract	913
SAVING MONEY	913
how it is done	913
SAVINGS BANK	913
how it is done	913
SAVING	913
how it is done	913
SAVING OF COMPENSATION	913
SAVING	913
whether or not it is a room	913
SCHEDULE	913
for contract time of W.C.A.A., P.W.	913
provision of the contract time of W.C.A.A., P.W.	913
to be a room of the contract	913
SCHOOLMASTER	913
whether or not it is a room	913

SCOPE OF CAPITAL THORITY	page
encompassed	138, 160
SCOPE OF EMPLOYMENT	
numberable for employment	5, 10
within	11
known to	135
considered employment	161
SOUL AND	
appealing to House of Lords	100
SKAMAN	
not within Employer's Control Act 1963	97
within 1963 Act 1963	105, 106, 107
SECURITY FOR DEBTS	
necessary to protect creditors' claims	161, 162
SECURITY OF STATE	
common law employment	700
SEATTLE	
debt in employment	10
debt in employment	10, 101
debt in employment	10
debt in employment in common law employment	10
debt in employment	10
SERVICES AND WELFARE AND EMPLOYMENT	
in domestic work Act 1966	10
in domestic work Act 1966	10
in domestic work Act 1966	107
in domestic work Act 1966	108
in domestic work Act 1966	100
in domestic work Act 1966	100
in domestic work Act 1966	100
in domestic work Act 1966	102
in domestic work Act 1966	103
in domestic work Act 1966	107
in domestic work Act 1966	110
SERVANT	
may be brought in the hands of mother	10
when	10
contract for a term	11
not a term	12
not bound to contract for a term	13 n 101
not on piece of work for a term	103
not under Employers' Liability Act 1963	104
not a term	115
not a term	116
obligation to do work with a term, even if not, made of	117 n 101
SERVANT IN HUSBANDRY	
when	254, 255

STATUTORY DUTY --	1461.
reference machinery	230
STATUTORY OBLIGATION --	
as to product of	15-18, 62
STATUTORY RIGHTS	
affidavit to prove liability	582
STATUTORY SURRENDERS	
voluntary contract limitation of	19, 36
STATUTORY SUBORDINATION	585
STAY under W.C. Act, 1906	
of execution pending appeal	614
apical from order of, now to Court of Appeal	619
of execution no order for costs for cost	618
STIP	
for time payment held for	172 n (c)
STRIKER	
a libelous	89
STRAIN	
death due to, as claimed by decedent	14
STRESSER	
recovery of damages from	305-6, 7
allocation of injuries between	193
STRIKE	
as tortious impediment for non-union	92
STRIKES	
as deduction in compensation, under Employment Unfairness Act, 1880	911
SUBCONTRACT	
common law rule	14
liability in respect of, under W.C. Act, 1906	95, 181
SUBCONTRACTING	
under W.C. Act, 1906	181
principal and contractor defined	181, 182
under the common law	182
under the W.C. Act, 1897	183
application of sect. 1 of W.C. Act, 1906	184
cases under 1897 Act still applicable	186
principle of the English cases	190
same as contractor and subcontractor under 1897 Act	191
meaning of "principal" and "contractor"	193
con or in or about the premises	194
SUBCONTRACTOR --	
workman not, not disentitled to recover against the contractor	14
position of	296
remedy over of under W.C. Act, 1906	181
(See CONTRACTOR)	

Index

947

VIOLATIONS OF RULES

 by workmen

VIS. MAJOR

 defined

- when then rule is not
- principled

(see also 100, 101)

VOLUNTARILY ACCEPT

 cheerfully and of one's

VOLUNTARILY PAYING

 under Law 100, 101 (100, 101, 102, 103, 104, 105)

VOLUNTARILY

 accepted

 paid

 paid

 received on condition of payment

100
101
102
103, 104

WAGES

 accepted by the worker and the employer

 paid

 paid

 paid

 paid on condition of payment

 paid on condition

 paid on condition

 paid on condition of payment

 paid on condition of payment

 paid on condition

 paid on condition of payment

100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
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159
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161
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163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
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182
183
184
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187
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212
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214
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243
244
245
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248
249
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252
253
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257
258
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261
262
263
264
265
266
267
268
269
270
271
272
273
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277
278
279
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281
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283
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285
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302
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323
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325
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330
331
332
333
334
335
336
337
338
339
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341
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343
344
345
346
347
348
349
350
351
352
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354
355
356
357
358
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360
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362
363
364
365
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367
368
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370
371
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373
374
375
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768
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792
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797
798
799
800
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802
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804
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812
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818
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825
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830
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832
833
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841
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848
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856
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858
859
860
861
862
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864
865
866
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868
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870
871
872
873
874
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880
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882
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986
987
988
989
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991
992
993
994
995
996
997
998
999
1000

WAGES

 accepted by the worker and the employer

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 accepted by the worker and the employer

WAGES

 accepted by the worker and the employer

 accepted by the worker and the employer

 accepted by the worker and the employer

 accepted by the worker and the employer

WAGES

 accepted

WALKING FORMS

 increase of superintending

100

WALL	Page
fall of	23, 33 n 60, 173
WARNING	
effect of discharge of, under W.C. Act 1906	37, 38
(See STRIKES AND WILFUL MISCONDUCT)	
WARREN	
of Pigeon	137
WATER COMPANY	
of London	61 n 10
WAY	
defect in condition of	165, 172
defect in	168
road of mine	171
fatal fire—common to	171
WEEK	
what is, under W.C. Act 1906	517
for computing	521
WEEKLY PAYMENTS	
when due	490 n 1, 521
in temporary contract employment	(See ACTS OF WILFUL MISCONDUCT)
WEEKLY PAYMENT	
referred to in Act	560
review of	561
may be reviewed	563, 564
amount of	565
date of termination of	576
not payable	572
WILFUL MISCONDUCT	
of labourer	572
WIFE	
living, separate in children under Lord Campbell's Act	101 n 16
living apart from husband under W.C. Act 1906	163
WILFUL ACT	
of servant	6, 20, 115
workman injured by, of	108, 175
meaning of	173, 111
under Employers' Liability Act 1900	111
WILFUL MISCONDUCT	
what is, under Act 1906	391
under impulse is not	109

WRONGDOER -

- may not apprehend or control his own property 600
- liable for the right to produce and to terminate his licence 600
- instructive about his conduct and to be 600
- infant may not own or control 600
- may be detained by owner in order to be compensated 600
- must not "proport" (See below) 600

YOL SEE PHUONS

- duty to maintain property 600
- duty to maintain 600
- defined by the Law of the State of the Republic of the 600
- defined by the State of the Republic of the 600
- who come within the definition 600
- modify 600
- children on a contract line 600
- rule of construction of the contract 600
- when 600
- contract of 600
- medical record of a person 600
- maintenance of children by a contract of a person 600
- widow 600

YOL SEE WOLKMA

- provision for the Law of the Republic of the 600

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INDEX OF SUBJECTS.

Abstract Drawing	27	Common Law	100
See 1907		1901-1911	20
Administration Actions	31	Compromis Law-	8
Wills 1901-1903		1901-1903	9
Almonsholder	1	1904-1911	29
Annually Law	11	Compensation	22
1901-1903		1901-1903	
See 1901		Compulsory Purchase	9
Advocacy	18	1901-1903	
1901-1911		Conflicts of Law	6
Affiliation	1	1901-1911	
1901-1903		Concubines	
Arbitration	1	1901-1911	
See 1903		Constitutional Law and History	10
Banking	1	1901-1903	10
1901-1903		1904-1911	30
Bankruptcy	1	1901-1903	10
1901-1903		1904-1911	12
1901-1903		Consolidation	1
1901-1903		1901-1903	1
1901-1903		Contract of Sale	12
1901-1903		1901-1903	
Bibliography	1	Conveyancing	14
Bills of Exchange	1	1901-1903	14
Wills 1901		1904-1911	14
Bills of Lading	1	Copyright	8
1901-1903		1901-1903	12
Bills of Sale	1	1904-1911	12
1901-1903		Corporation	1
1901-1903		1901-1903	1
1901-1903		1904-1911	9
Capital Punishment	1	Costs, Crown Office	1
1901-1903		1901-1903	1
Carriers	1	Covenant for Title	1
1901-1903		1901-1903	1
Chancery Division, Practice of	1	Crew of a Ship	1
See 1901-1903		1901-1903	1
1901-1903		Criminal Appeals	1
Wills 1901		1901-1903	1
See 1901		Criminal Law	1
Charitable Trusts	1	1901-1903	1
1901-1903		1904-1911	1
1901-1903		Crown Law	1
Wills 1901		1901-1903	1
Children	1	1904-1911	1
1901-1903		1901-1903	1
Church and Clergy	1	Crown Office Rules	1
1901-1903		1901-1903	1
Civil Law	1	Crown Practice	1
1901-1903		1901-1903	1
Civil Law	1	Custom and Usage	1
Wills 1901-1903		1901-1903	1
Collisions at Sea	1	Damages	1
1901-1903		1901-1903	1
Colonial Law	1	Death Duties	1
1901-1903		1901-1903	1
1901-1903		Debt Recovery	1
Commercial Agency	1	1901-1903	1
1901-1903		Desertion	1
Commercial Law	1	1901-1903	1
1901-1903		Discovery	1
1901-1903		1901-1903	1

INDEX OF SUBJECTS *continued.*

	PAGE		PAGE
Divorce—		History—	
Harrison 1891	19	Faswell-Langmead 1911	30
Domestic Relations—		Husband and Wife—	
Eversley 1900	16	Eversley 1900	15
Domestic		Injuries	
See PRIVATE INTERNATIONAL LAW		Eversley 1900	15
Dutch Law 1887	31	Simpson 1909	28
Ecclesiastical Law—		Injunctions	
Bice 1875	8	Joyce 1877	21
South 1914	28	Insurance	
Education Acts		Harley 1911	15
See MAGISTERIAL LAW.		Porter 1908	25
Election Law and Petitions—		International Law	
O'Malley and Handcastle 1911	24	Bay 1909	6
Seger 1881	27	Clarke 1903	11
Employers' Liability—		Cobbett 1913	11
Bevan 1900	7	Boote 1914	16
Equity		Phillipson 1908	25
Blyth 1912	8	Interrogatories	
Choyce Cases 1879	11	Pick 1883	24
Snell 1912	29	Intoxicating Liquors—	
Story 1862	30	See MAGISTERIAL LAW.	
White 1889	31	Joint Stock Companies—	
Evidence—		See COMPANIES.	
Pherson 1914	25	Judicature Acts	
Examination of Students		Cunningham and Mattinson 1884	13
Indemnity 1906	21	Heldamer 1875	21
Intermediate LL.B. 1889	18	Jurisprudence	
Executors		Schmidt 1913	27
Walker and Heyod 1905	31	Justinian's Institutes	
Extradition—		Campbell 1862	10
Chubb 1903	11	Harris 1899	19
See MAGISTERIAL LAW.		King's Bench Division, Practice	
Factories—		of—	
See MAGISTERIAL LAW.		Indemnity 1905	21
Fisheries		Landlord and Tenant	
Moore 1903	24	For 1914	16
See MAGISTERIAL LAW.		Lands Clauses Consolidation Act—	
Foreign Law		Lloyd 1895	22
Dutch Law 1887	31	Land Values	
Foot 1914	16	D'Almeida & Simons 1911	14
Foreshore—		Latin Maxims—	
Moore 1888	24	1903	13
Forgery		Leading Cases	
See MAGISTERIAL LAW.		Common Law 1903	20
Fraudulent Conveyances		Consolidated Law 1908	30
May 1908	23	Equity and Conveyancing 1913	20
Gaius Institutes		International Law 1913	11
Harris 1899	10	Leading Statutes	
Game Laws—		Thomas 1878	30
See MAGISTERIAL LAW.		Leases—	
Guardian and Ward		Copinger 1875	13
Eversley 1900	15	Legacy and Succession—	
Hackney Carriages—		Henson 1911	18
See MAGISTERIAL LAW.		Legitimacy and Marriage	
Hindu Law—		See PRIVATE INTERNATIONAL LAW.	
Mayne 1914	24	Licensing—	
		Whitely 1911	32
		See MAGISTERIAL LAW.	

INDEX OF SUBJECTS- *continued.*

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INDEX OF SUBJECTS—continued.

	PAGE		PAGE
Quarter Sessions—		Shopmasters and Seamen—	
Smith (P. J.) 1882	28	Kay, 1895	22
Questions for Students—		Societies—See CORPORATION	
Alfred 1892	6	Stage Carriages—	
For Examination Journal 1894	6	See MAGISTERIAL LAW.	
Indemnity 1887	21	Stamp Duties—	
Waite, 1889	31	Copinger 1878	12
Railways—		Statute of Limitations—	
Browne, 1875	9	Bunning 1900	6
Williams 1912	32	Statutes—	
Rating—		Cole 1911	13
Browne, 1886	9	Mace 1883	23
Real Property—		Thomas 1878	39
Dene 1883	13	Stolen Goods—	
Edwards, 1904	15	Attenborough, 1906	6
Turner 1882	30	Stoppage in Transit.	
Recovery—		Kay 1895	22
Dubs 1909	14	Succession Duties	
Attenborough (Stolen Goods), 1906	6	Hanson 1911	18
Registration		Succession Laws	
Elliott (Newspaper) 1884	13	Lloyd 1877	23
Sarge (Parliamentary) 1881	27	Supreme Court of Judicature,	
Reports		Practice of	
Bellwe, 1869	7	Indemnity, 1905	21
Brooke 1873	9	Telegraphs—See MAGISTERIAL LAW.	
Choice Cases 1879	11	Title Deeds Copinger 1875	3
Cooke 1872	12	Torts—	
Criminal Appeal, 1908 to	13	Ringwood, 1906	26
Cunningham 1871	13	Salmond, 1912	27
Election Petitions, 1911	24	Trade Union Law—	
Emilsson, 1870	19	Cohen 1913	12
Gibbs, Seymour Will Case 1877	17	Tramways and Light Railways—	
Kelving, John 1873	22	Bice 1900	8
Kelving, William 1873	22	Treason	
Showers (Cases in Parliament)		Chalmers 1910	10
1876	28	Kelving 1873	22
South African, 1877 1881 1893 9	29	Tiswell Langford 1911	30
Reversion Duty—		Trials—	
Devonshire and Simud 1913	14	Boulch, A (Mendell) 1886	31
Roman Dutch Law—		CHURCH, GILLES 1870	10
Van Leeuwen 1887	31	Trustees—	
Berwick, 1902	7	Easton 1900	15
Roman Law—		Ultra Vires—	
Campbell 1892	10	Bice, 1893	8
Harris, 1899	19	Voluntary Conveyances	
Salkowski, 1886	26	May 1908	23
Whitfield 1886	26	War on Contracts—	
Salvage—		Phillipson 1909	25
Jones, 1870	21	Water Courses—	
Kay, 1895	22	Higgins, 1877	19
Savings Banks—		Wills—	
Forbes, 1884	16	Mathews 1908	23
Scintillae Juris—		Working Classes, Housing of—	
Darling (C. J.) 1914	14	Lloyd 1895	23
Sea Shore—		Workmen's Compensation—	
Hall, 1888	23	Beven, 1909	7
Moore, 1888	23		

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425, 427, 429, 431, 433, 435, 437, 439, 441, 443, 445, 447, 449, 451, 453, 455, 457, 459, 461, 463, 465, 467, 469, 471, 473, 475, 477, 479, 481, 483, 485, 487, 489, 491, 493, 495, 497, 499, 501, 503, 505, 507, 509, 511, 513, 515, 517, 519, 521, 523, 525, 527, 529, 531, 533, 535, 537, 539, 541, 543, 545, 547, 549, 551, 553, 555, 557, 559, 561, 563, 565, 567, 569, 571, 573, 575, 577, 579, 581, 583, 585, 587, 589, 591, 593, 595, 597, 599, 601, 603, 605, 607, 609, 611, 613, 615, 617, 619, 621, 623, 625, 627, 629, 631, 633, 635, 637, 639, 641, 643, 645, 647, 649, 651, 653, 655, 657, 659, 661, 663, 665, 667, 669, 671, 673, 675, 677, 679, 681, 683, 685, 687, 689, 691, 693, 695, 697, 699, 701, 703, 705, 707, 709, 711, 713, 715, 717, 719, 721, 723, 725, 727, 729, 731, 733, 735, 737, 739, 741, 743, 745, 747, 749, 751, 753, 755, 757, 759, 761, 763, 765, 767, 769, 771, 773, 775, 777, 779, 781, 783, 785, 787, 789, 791, 793, 795, 797, 799, 801, 803, 805, 807, 809, 811, 813, 815, 817, 819, 821, 823, 825, 827, 829, 831, 833, 835, 837, 839, 841, 843, 845, 847, 849, 851, 853, 855, 857, 859, 861, 863, 865, 867, 869, 871, 873, 875, 877, 879, 881, 883, 885, 887, 889, 891, 893, 895, 897, 899, 901, 903, 905, 907, 909, 911, 913, 915, 917, 919, 921, 923, 925, 927, 929, 931, 933, 935, 937, 939, 941, 943, 945, 947, 949, 951, 953, 955, 957, 959, 961, 963, 965, 967, 969, 971, 973, 975, 977, 979, 981, 983, 985, 987, 989, 991, 993, 995, 997, 999, 1001, 1003, 1005, 1007, 1009, 1011, 1013, 1015, 1017, 1019, 1021, 1023, 1025, 1027, 1029, 1031, 1033, 1035, 1037, 1039, 1041, 1043, 1045, 1047, 1049, 1051, 1053, 1055, 1057, 1059, 1061, 1063, 1065, 1067, 1069, 1071, 1073, 1075, 1077, 1079, 1081, 1083, 1085, 1087, 1089, 1091, 1093, 1095, 1097, 1099, 1101, 1103, 1105, 1107, 1109, 1111, 1113, 1115, 1117, 1119, 1121, 1123, 1125, 1127, 1129, 1131, 1133, 1135, 1137, 1139, 1141, 1143, 1145, 1147, 1149, 1151, 1153, 1155, 1157, 1159, 1161, 1163, 1165, 1167, 1169, 1171, 1173, 1175, 1177, 1179, 1181, 1183, 1185, 1187, 1189, 1191, 1193, 1195, 1197, 1199, 1201, 1203, 1205, 1207, 1209, 1211, 1213, 1215, 1217, 1219, 1221, 1223, 1225, 1227, 1229, 1231, 1233, 1235, 1237, 1239, 1241, 1243, 1245, 1247, 1249, 1251, 1253, 1255, 1257, 1259, 1261, 1263, 1265, 1267, 1269, 1271, 1273, 1275, 1277, 1279, 1281, 1283, 1285, 1287, 1289, 1291, 1293, 1295, 1297, 1299, 1301, 1303, 1305, 1307, 1309, 1311, 1313, 1315, 1317, 1319, 1321, 1323, 1325, 1327, 1329, 1331, 1333, 1335, 1337, 1339, 1341, 1343, 1345, 1347, 1349, 1351, 1353, 1355, 1357, 1359, 1361, 1363, 1365, 1367, 1369, 1371, 1373, 1375, 1377, 1379, 1381, 1383, 1385, 1387, 1389, 1391, 1393, 1395, 1397, 1399, 1401, 1403, 1405, 1407, 1409, 1411, 1413, 1415, 1417, 1419, 1421, 1423, 1425, 1427, 1429, 1431, 1433, 1435, 1437, 1439, 1441, 1443, 1445, 1447, 1449, 1451, 1453, 1455, 1457, 1459, 1461, 1463, 1465, 1467, 1469, 1471, 1473, 1475, 1477, 1479, 1481, 1483, 1485, 1487, 1489, 1491, 1493, 1495, 1497, 1499, 1501, 1503, 1505, 1507, 1509, 1511, 1513, 1515, 1517, 1519, 1521, 1523, 1525, 1527, 1529, 1531, 1533, 1535, 1537, 1539, 1541, 1543, 1545, 1547, 1549, 1551, 1553, 1555, 1557, 1559, 1561, 1563, 1565, 1567, 1569, 1571, 1573, 1575, 1577, 1579, 1581, 1583, 1585, 1587, 1589, 1591, 1593, 1595, 1597, 1599, 1601, 1603, 1605, 1607, 1609, 1611, 1613, 1615, 1617, 1619, 1621, 1623, 1625, 1627, 1629, 1631, 1633, 1635, 1637, 1639, 1641, 1643, 1645, 1647, 1649, 1651, 1653, 1655, 1657, 1659, 1661, 1663, 1665, 1667, 1669, 1671, 1673, 1675, 1677, 1679, 1681, 1683, 1685, 1687, 1689, 1691, 1693, 1695, 1697, 1699, 1701, 1703, 1705, 1707, 1709, 1711, 1713, 1715, 1717, 1719, 1721, 1723, 1725, 1727, 1729, 1731, 1733, 1735, 1737, 1739, 1741, 1743, 1745, 1747, 1749, 1751, 1753, 1755, 1757, 1759, 1761, 1763, 1765, 1767, 1769, 1771, 1773, 1775, 1777, 1779, 1781, 1783, 1785, 1787, 1789, 1791, 1793, 1795, 1797, 1799, 1801, 1803, 1805, 1807, 1809, 1811, 1813, 1815, 1817, 1819, 1821, 1823, 1825, 1827, 1829, 1831, 1833, 1835, 1837, 1839, 1841, 1843, 1845, 1847, 1849, 1851, 1853, 1855, 1857, 1859, 1861, 1863, 1865, 1867, 1869, 1871, 1873, 1875, 1877, 1879, 1881, 1883, 1885, 1887, 1889, 1891, 1893, 1895, 1897, 1899, 1901, 1903, 1905, 1907, 1909, 1911, 1913, 1915, 1917, 1919, 1921, 1923, 1925, 1927, 1929, 1931, 1933, 1935, 1937, 1939, 1941, 1943, 1945, 1947, 1949, 1951, 1953, 1955, 1957, 1959, 1961, 1963, 1965, 1967, 1969, 1971, 1973, 1975, 1977, 1979, 1981, 1983, 1985, 1987, 1989, 1991, 1993, 1995, 1997, 1999, 2001, 2003, 2005, 2007, 2009, 2011, 2013, 2015, 2017, 2019, 2021, 2023, 2025, 2027, 2029, 2031, 2033, 2035, 2037, 2039, 2041, 2043, 2045, 2047, 2049, 2051, 2053, 2055, 2057, 2059, 2061, 2063, 2065, 2067, 2069, 2071, 2073, 2075, 2077, 2079, 2081, 2083, 2085, 2087, 2089, 2091, 2093, 2095, 2097, 2099, 2101, 2103, 2105, 2107, 2109, 2111, 2113, 2115, 2117, 2119, 2121, 2123, 2125, 2127, 2129, 2131, 2133, 2135, 2137, 2139, 2141, 2143, 2145, 2147, 2149, 2151, 2153, 2155, 2157, 2159, 2161, 2163, 2165, 2167, 2169, 2171, 2173, 2175, 2177, 2179, 2181, 2183, 2185, 2187, 2189, 2191, 2193, 2195, 2197, 2199, 2201, 2203, 2205, 2207, 2209, 2211, 2213, 2215, 2217, 2219, 2221, 2223, 2225, 2227, 2229, 2231, 2233, 2235, 2237, 2239, 2241, 2243, 2245, 2247, 2249, 2251, 2253, 2255, 2257, 2259, 2261, 2263, 2265, 2267, 2269, 2271, 2273, 2275, 2277, 2279, 2281, 2283, 2285, 2287, 2289, 2291, 2293, 2295, 2297, 2299, 2301, 2303, 2305, 2307, 2309, 2311, 2313, 2315, 2317, 2319, 2321, 2323, 2325, 2327, 2329, 2331, 2333, 2335, 2337, 2339, 2341, 2343, 2345, 2347, 2349, 2351, 2353, 2355, 2357, 2359, 2361, 2363, 2365, 2367, 2369, 2371, 2373, 2375, 2377, 2379, 2381, 2383, 2385, 2387, 2389, 2391, 2393, 2395, 2397, 2399, 2401, 2403, 2405, 2407, 2409, 2411, 2413, 2415, 2417, 2419, 2421, 2423, 2425, 2427, 2429, 2431, 2433, 2435, 2437, 2439, 2441, 2443, 2445, 2447, 2449, 2451, 2453, 2455, 2457, 2459, 2461, 2463, 2465, 2467, 2469, 2471, 2473, 2475, 2477, 2479, 2481, 2483, 2485, 2487, 2489, 2491, 2493, 2495, 2497, 2499, 2501, 2503, 2505, 2507, 2509, 2511, 2513, 2515, 2517, 2519, 2521, 2523, 2525, 2527, 2529, 2531, 2533, 2535, 2537, 2539, 2541, 2543, 2545, 2547, 2549, 2551, 2553, 2555, 2557, 2559, 2561, 2563, 2565, 2567, 2569, 2571, 2573, 2575, 2577, 2579, 2581, 2583, 2585, 2587, 2589, 2591, 2593, 2595, 2597, 2599, 2601, 2603, 2605, 2607, 2609, 2611, 2613, 2615, 2617, 2619, 2621, 2623, 2625, 2627, 2629, 2631, 2633, 2635, 2637, 2639, 2641, 2643, 2645, 2647, 2649, 2651, 2653, 2655, 2657, 2659, 2661, 2663, 2665, 2667, 2669, 2671, 2673, 2675, 2677, 2679, 2681, 2683, 2685, 2687, 2689, 2691, 2693, 2695, 2697, 2699, 2701, 2703, 2705, 2707, 2709, 2711, 2713, 2715, 2717, 2719, 2721, 2723, 2725, 2727, 2729, 2731, 2733, 2735, 2737, 2739, 2741, 2743, 2745, 2747, 2749, 2751, 2753, 2755, 2757, 2759, 2761, 2763, 2765, 2767, 2769, 2771, 2773, 2775, 2777, 2779, 2781, 2783, 2785, 2787, 2789, 2791, 2793, 2795, 2797, 2799, 2801, 2803, 2805, 2807, 2809, 2811, 2813, 2815, 2817, 2819, 2821, 2823, 2825, 2827, 2829, 2831, 2833, 2835, 2837, 2839, 2841, 2843, 2845, 2847, 2849, 2851, 2853, 2855, 2857, 2859, 2861, 2863, 2865, 2867, 2869, 2871, 2873, 2875, 2877, 2879, 2881, 2883, 2885, 2887, 2889, 2891, 2893, 2895, 2897, 2899, 2901, 2903, 2905, 2907, 2909, 2911, 2913, 2915, 2917, 2919, 2921, 2923, 2925, 2927, 2929, 2931, 2933, 2935, 2937, 2939, 2941, 2943, 2945, 2947, 2949, 2951, 2953, 2955, 2957, 2959, 2961, 2963, 2965, 2967, 2969, 2971, 2973, 2975, 2977, 2979, 2981, 2983, 2985, 2987, 2989, 2991, 2993, 2995, 2997, 2999, 3001, 3003, 3005, 3007, 3009, 3011, 3013, 3015, 3017, 3019, 3021, 3023, 3025, 3027, 3029, 3031, 3033, 3035, 3037, 3039, 3041, 3043, 3045, 3047, 3049, 3051, 3053, 3055, 3057, 3059, 3061, 3063, 3065, 3067, 3069, 3071, 3073, 3075, 3077, 3079, 3081, 3083, 3085, 3087, 3089, 3091, 3093, 3095, 3097, 3099, 3101, 3103, 3105, 3107, 3109, 3111, 3113, 3115, 3117, 3119, 3121, 3123, 3125, 3127, 3129, 3131, 3133, 3135, 3137, 3139, 3141, 3143, 3145, 3147, 3149, 3151, 3153, 3155, 3157, 3159, 3161, 3163, 3165, 3167, 3169, 3171, 3173, 3175, 3177, 3179, 3181, 3183, 3185, 3187, 3189, 3191, 3193, 3195, 3197, 3199, 3201, 3203, 3205, 3207, 3209, 3211, 3213, 3215, 3217, 3219, 3221, 3223, 3225, 3227, 3229, 3231, 3233, 3235, 3237, 3239, 3241, 3243, 3245, 3247, 3249, 3251, 3253, 3255, 3257, 3259, 3261, 3263, 3265, 3267, 3269, 3271, 3273, 3275, 3277, 3279, 3281, 3283, 3285, 3287, 3289, 3291, 3293, 3295, 3297, 3299, 3301, 3303, 3305, 3307, 3309, 3311, 3313, 3315, 3317, 3319, 3321, 3323, 3325, 3327, 3329, 3331, 3333, 3335, 3337, 3339, 3341, 3343, 3345, 3347, 3349, 3351, 3353, 3355, 3357, 3359, 3361, 3363, 3365, 3367, 3369, 3371, 3373, 3375, 3377, 3379, 3381, 3383, 3385, 3387, 3389, 3391, 3393, 3395, 3397, 3399, 3401, 3403, 3405, 3407, 3409, 3411, 3413, 3415, 3417, 3419, 3421, 3423, 3425, 3427, 3429, 3431, 3433, 3435, 3437, 3439, 3441, 3443, 3445, 3447, 3449, 3451, 3453, 3455, 3457, 3459, 3461, 3463, 3465, 3467, 3469, 3471, 3473, 3475, 3477, 3479, 3481, 3483, 3485, 3487, 3489, 3491, 3493, 3495, 3497, 3499, 3501, 3503, 3505, 3507, 3509, 3511, 3513, 3515, 3517, 3519, 3521, 3523, 3525, 3527, 3529, 3531, 3533, 3535, 3537, 3539, 3541, 3543, 3545, 3547, 3549, 3551, 3553, 3555, 3557, 3559, 3561, 3563, 3565, 3567, 3569, 3571, 3573, 3575, 3577, 3579, 3581, 3583, 3585, 3587, 3589, 3591, 3593, 3595, 3597, 3599, 3601, 3603, 3605, 3607, 3609, 3611, 3613, 3615, 3617, 3619, 3621, 3623, 3625, 3627, 3629, 3631, 3633, 3635, 3637, 3639, 3641, 3643, 3645, 3647, 3649, 3651, 3653, 3655, 3657, 3659, 3661, 3663, 3665, 3667, 3669, 3671, 3673, 3675, 3677, 3679, 3681, 3683, 3685, 3687, 3689, 3691, 3693, 3695, 3697, 3699, 3701, 3703, 3705, 3707, 3709, 3711, 3713, 3715, 3717, 3719, 3721, 3723, 3725, 3727, 3729, 3731, 3733, 3735, 3737, 3739, 3741, 3743, 3745, 3747, 3749, 3751, 3753, 3755, 3757, 3759, 3761, 3763, 3765, 3767, 3769, 3771, 3773, 3775, 3777, 3779, 3781, 3783, 3785, 3787, 3789, 3791, 3793, 3795, 3797, 3799, 3801, 3803, 3805, 3807, 3809, 3811, 3813, 3815, 3817, 3819, 3821, 3823, 3825, 3827, 3829, 3831, 3833, 3835, 3837, 3839, 3841, 3843, 3845, 3847, 3849, 3851, 3853, 3855, 3857, 3859, 3861, 3863, 3865, 3867, 3869, 3871, 3873, 3875, 3877, 3879, 3881, 3883, 3885, 3887, 3889, 3891, 3893, 3895, 3897, 3899, 3901, 3903, 3905, 3907, 3909, 3911, 3913, 3915, 3917, 3919, 3921, 3923, 3925, 3927, 3929, 3931, 3933, 3935, 3937, 3939, 3941, 3943, 3945, 3947, 3949, 3951, 3953, 3955, 3957, 3959, 3961, 3963, 3965, 3967, 3969, 3971, 3973, 3975, 3977, 3979, 3981, 3983, 3985, 3987, 3989, 3991, 3993, 3995, 3997, 3999, 4001, 4003, 4005, 4007, 4009, 4011, 4013, 4015, 4017, 4019, 4021, 4023, 4025, 4027, 4029, 4031, 4033, 4035, 4037, 4039, 4041, 4043, 4045, 4047, 4049, 4051, 4053, 4055, 4057, 4059, 4061, 4063, 4065, 4067, 4069, 4071, 4073, 4075, 4077, 4079, 4081, 4083, 4085, 4087, 4089, 4091, 4093, 4095, 4097, 4099, 4101, 4103, 4105, 4107, 4109, 4111, 4113, 4115, 4117, 4119, 4121, 4123, 4125, 4127, 4129, 4131, 4133, 4135, 4137, 4139, 4141, 4143, 4145, 4147, 4149, 4151, 4153, 4155, 4157, 4159, 4161, 4163, 4165, 4167, 4169, 4171, 4173, 4175, 4177, 4179, 4181, 4183, 4185, 4187, 4189, 4191, 4193, 4195, 4197, 4199, 4201, 4203, 4205, 4207, 4209, 4211, 4213, 4215, 4217, 4219, 4221, 4223, 4225, 4227, 4229, 4231, 4233, 4235, 4237, 4239, 4241, 4243, 4245, 4247, 4249, 4251, 4253, 4255, 4257, 4259, 4261, 4263, 4

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* The authors are grateful to the National Science Foundation for support of this work.

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JOSEPH A. LOVATT, Major, U. S. Army, Chief of Command of the
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$$\chi^2 = \frac{n(n_{11}n_{22} - n_{12}n_{21})^2}{(n_{11} + n_{12})(n_{21} + n_{22})(n_{11} + n_{21})(n_{12} + n_{22})} \quad (8.1)$$

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P. J. 1991. 1. The 1991-1992 season. 2. The 1992-1993 season. 3. The 1993-1994 season. 4. The 1994-1995 season. 5. The 1995-1996 season. 6. The 1996-1997 season. 7. The 1997-1998 season. 8. The 1998-1999 season. 9. The 1999-2000 season. 10. The 2000-2001 season. 11. The 2001-2002 season. 12. The 2002-2003 season. 13. The 2003-2004 season. 14. The 2004-2005 season. 15. The 2005-2006 season. 16. The 2006-2007 season. 17. The 2007-2008 season. 18. The 2008-2009 season. 19. The 2009-2010 season. 20. The 2010-2011 season. 21. The 2011-2012 season. 22. The 2012-2013 season. 23. The 2013-2014 season. 24. The 2014-2015 season. 25. The 2015-2016 season. 26. The 2016-2017 season. 27. The 2017-2018 season. 28. The 2018-2019 season. 29. The 2019-2020 season. 30. The 2020-2021 season. 31. The 2021-2022 season. 32. The 2022-2023 season. 33. The 2023-2024 season. 34. The 2024-2025 season. 35. The 2025-2026 season. 36. The 2026-2027 season. 37. The 2027-2028 season. 38. The 2028-2029 season. 39. The 2029-2030 season. 40. The 2030-2031 season. 41. The 2031-2032 season. 42. The 2032-2033 season. 43. The 2033-2034 season. 44. The 2034-2035 season. 45. The 2035-2036 season. 46. The 2036-2037 season. 47. The 2037-2038 season. 48. The 2038-2039 season. 49. The 2039-2040 season. 50. The 2040-2041 season. 51. The 2041-2042 season. 52. The 2042-2043 season. 53. The 2043-2044 season. 54. The 2044-2045 season. 55. The 2045-2046 season. 56. The 2046-2047 season. 57. The 2047-2048 season. 58. The 2048-2049 season. 59. The 2049-2050 season. 60. The 2050-2051 season. 61. The 2051-2052 season. 62. The 2052-2053 season. 63. The 2053-2054 season. 64. The 2054-2055 season. 65. The 2055-2056 season. 66. The 2056-2057 season. 67. The 2057-2058 season. 68. The 2058-2059 season. 69. The 2059-2060 season. 70. The 2060-2061 season. 71. The 2061-2062 season. 72. The 2062-2063 season. 73. The 2063-2064 season. 74. The 2064-2065 season. 75. The 2065-2066 season. 76. The 2066-2067 season. 77. The 2067-2068 season. 78. The 2068-2069 season. 79. The 2069-2070 season. 80. The 2070-2071 season. 81. The 2071-2072 season. 82. The 2072-2073 season. 83. The 2073-2074 season. 84. The 2074-2075 season. 85. The 2075-2076 season. 86. The 2076-2077 season. 87. The 2077-2078 season. 88. The 2078-2079 season. 89. The 2079-2080 season. 90. The 2080-2081 season. 91. The 2081-2082 season. 92. The 2082-2083 season. 93. The 2083-2084 season. 94. The 2084-2085 season. 95. The 2085-2086 season. 96. The 2086-2087 season. 97. The 2087-2088 season. 98. The 2088-2089 season. 99. The 2089-2090 season. 100. The 2090-2091 season. 101. The 2091-2092 season. 102. The 2092-2093 season. 103. The 2093-2094 season. 104. The 2094-2095 season. 105. The 2095-2096 season. 106. The 2096-2097 season. 107. The 2097-2098 season. 108. The 2098-2099 season. 109. The 2099-2100 season. 110. The 2100-2101 season. 111. The 2101-2102 season. 112. The 2102-2103 season. 113. The 2103-2104 season. 114. The 2104-2105 season. 115. The 2105-2106 season. 116. The 2106-2107 season. 117. The 2107-2108 season. 118. The 2108-2109 season. 119. The 2109-2110 season. 120. The 2110-2111 season. 121. The 2111-2112 season. 122. The 2112-2113 season. 123. The 2113-2114 season. 124. The 2114-2115 season. 125. The 2115-2116 season. 126. The 2116-2117 season. 127. The 2117-2118 season. 128. The 2118-2119 season. 129. The 2119-2120 season. 130. The 2120-2121 season. 131. The 2121-2122 season. 132. The 2122-2123 season. 133. The 2123-2124 season. 134. The 2124-2125 season. 135. The 2125-2126 season. 136. The 2126-2127 season. 137. The 2127-2128 season. 138. The 2128-2129 season. 139. The 2129-2130 season. 140. The 2130-2131 season. 141. The 2131-2132 season. 142. The 2132-2133 season. 143. The 2133-2134 season. 144. The 2134-2135 season. 145. The 2135-2136 season. 146. The 2136-2137 season. 147. The 2137-2138 season. 148. The 2138-2139 season. 149. The 2139-2140 season. 150. The 2140-2141 season. 151. The 2141-2142 season. 152. The 2142-2143 season. 153. The 2143-2144 season. 154. The 2144-2145 season. 155. The 2145-2146 season. 156. The 2146-2147 season. 157. The 2147-2148 season. 158. The 2148-2149 season. 159. The 2149-2150 season. 160. The 2150-2151 season. 161. The 2151-2152 season. 162. The 2152-2153 season. 163. The 2153-2154 season. 164. The 2154-2155 season. 165. The 2155-2156 season. 166. The 2156-2157 season. 167. The 2157-2158 season. 168. The 2158-2159 season. 169. The 2159-2160 season. 170. The 2160-2161 season. 171. The 2161-2162 season. 172. The 2162-2163 season. 173. The 2163-2164 season. 174. The 2164-2165 season. 175. The 2165-2166 season. 176. The 2166-2167 season. 177. The 2167-2168 season. 178. The 2168-2169 season. 179. The 2169-2170 season. 180. The 2170-2171 season. 181. The 2171-2172 season. 182. The 2172-2173 season. 183. The 2173-2174 season. 184. The 2174-2175 season. 185. The 2175-2176 season. 186. The 2176-2177 season. 187. The 2177-2178 season. 188. The 2178-2179 season. 189. The 2179-2180 season. 190. The 2180-2181 season. 191. The 2181-2182 season. 192. The 2182-2183 season. 193. The 2183-2184 season. 194. The 2184-2185 season. 195. The 2185-2186 season. 196. The 2186-2187 season. 197. The 2187-2188 season. 198. The 2188-2189 season. 199. The 2189-2190 season. 200. The 2190-2191 season. 201. The 2191-2192 season. 202. The 2192-2193 season. 203. The 2193-2194 season. 204. The 2194-2195 season. 205. The 2195-2196 season. 206. The 2196-2197 season. 207. The 2197-2198 season. 208. The 2198-2199 season. 209. The 2199-2200 season. 210. The 2200-2201 season. 211. The 2201-2202 season. 212. The 2202-2203 season. 213. The 2203-2204 season. 214. The 2204-2205 season. 215. The 2205-2206 season. 216. The 2206-2207 season. 217. The 2207-2208 season. 218. The 2208-2209 season. 219. The 2209-2210 season. 220. The 2210-2211 season. 221. The 2211-2212 season. 222. The 2212-2213 season. 223. The 2213-2214 season. 224. The 2214-2215 season. 225. The 2215-2216 season. 226. The 2216-2217 season. 227. The 2217-2218 season. 228. The 2218-2219 season. 229. The 2219-2220 season. 230. The 2220-2221 season. 231. The 2221-2222 season. 232. The 2222-2223 season. 233. The 2223-22

The following table shows the number of persons who have been
 employed in the various occupations in the United States, from
 1870 to 1890, and the number who have been employed in the
 same occupations in the same years.

As a result of the above, the following conclusions can be drawn:

- (1) The Mg^{2+} concentration in the solution is an important factor in the adsorption of Mg^{2+} by the soil.
- (2) The adsorption of Mg^{2+} by the soil is a reversible process.
- (3) The adsorption of Mg^{2+} by the soil is a non-specific process.
- (4) The adsorption of Mg^{2+} by the soil is a non-linear process.
- (5) The adsorption of Mg^{2+} by the soil is a non-ideal process.
- (6) The adsorption of Mg^{2+} by the soil is a non-ideal process.
- (7) The adsorption of Mg^{2+} by the soil is a non-ideal process.
- (8) The adsorption of Mg^{2+} by the soil is a non-ideal process.
- (9) The adsorption of Mg^{2+} by the soil is a non-ideal process.
- (10) The adsorption of Mg^{2+} by the soil is a non-ideal process.

1. Cu^{2+} and Ni^{2+} ions. In the case of W_2O_7 and W_6O_{21} ions, the
 2. W_2O_7 and W_6O_{21} ions are not present in the solution. In the
 3. case of W_2O_7 and W_6O_{21} ions, the W_2O_7 and W_6O_{21} ions are not present in the solution.

By A. M. Whitten, III, Commissioner of the Crown Survey, 1901.

1. The first group of people who are likely to be affected by the proposed changes are those who are currently employed in the public sector. This group includes a wide range of individuals, from those who are employed in the civil service to those who are employed in the health service. The proposed changes are likely to have a significant impact on this group, as they will be required to adapt to a new set of rules and regulations. This could lead to a number of problems, including a loss of morale and a decrease in productivity. It is therefore essential that the government takes steps to ensure that this group is adequately supported and that their concerns are taken into account.

TABLE OF CONTENTS

DEDICATION	iv
PREFACE	v
TABLE OF CASES	xvi
TABLE OF STATUTES	lxix
CORRIGENDA ET ADDENDA	lxxiv

PART I

EMPLOYERS' LIABILITY AT COMMON LAW

CHAPTER I

PRELIMINARY AND DEFINITIONS	3
-----------------------------	---

CHAPTER II

THE POSITION OF THE EMPLOYER AND HIS WORKMEN AT COMMON LAW	19
--	----

CHAPTER III

NEGLIGENCE	49
------------	----

CHAPTER IV

CONTRIBUTORY NEGLIGENCE	85
-------------------------	----

CHAPTER V

LORD CAMPBELL'S ACTS, OTHERWISE THE FATAL ACCIDENTS ACTS, 1846-1864	PAGE 101
---	-------------

PART IV

THE EMPLOYERS LIABILITY ACT, 1880

TEXT OF THE ACT	123
-----------------	-----

CHAPTER VI

COMMENTARY	131
SERVICE OF THE EMPLOYER	138
SCOPE OF EMPLOYMENT	141
PROPOSITIONS	145
I. DEFECT IN CONDITION	156
Ways	168
Works	173
Machinery	175
Plant	181
II. NEGLIGENCE IN SUPERINTENDENCE	197
III. INJURY THROUGH CONFORMING TO ORDERS	207
IV. OBEDIENCE TO RULES OR BYE-LAWS CAUSING INJURY	224
V. CHARGE OR CONTROL OF ANY SIGNAL, POINTS, &c., ON A RAILWAY	234
Compensation	239
Notices of Action and Injury	255
Workman defined	266
Infants' Contracts	280
Government Employments	283
Contractor and Employer	284
Contract of Service	288
Rights in which one may be on premises	292
Note on Contracting Out	294

PART III
WORKMEN'S COMPENSATION ACT, 1906

	PAGE
TEXT OF ACT	299

CHAPTER VII
THE RIGHTS CONFERRED

COMPENSARY	345
INJURY BY ACCIDENT	346
INDUSTRIAL DISEASES	355
COURSE OF EMPLOYMENT	369
WEEKLY EARNINGS	391
SERIOUS AND WILFUL MISCONDUCT	394
NO DOUBLE COMPENSATION	412
WORKMAN'S OPTION	416
CONTRACTING OUT OF ACT	427

CHAPTER VIII
WORKMEN AND EMPLOYER

WORKMEN	441-462
SEAMEN	450
CASUAL EMPLOYMENT	455
DEFENDANTS	462
THE EMPLOYER	477
SUB-CONTRACTING	481
INDEMNITY UNDER SECT. 4	512

Table of Contents

CHAPTER IX

COMPENSATION

	PAGE
(1) COMPENSATION TO THE RELATIVES IN CASE OF DEATH	518
(A) <i>Total Dependency</i>	518
(B) <i>Partial Dependency</i>	547
(C) <i>Where no Dependents are left</i>	551
(2) SUBSISTENCE TO A WORKMAN INJURED	552
(A) <i>Totally Disabled</i>	552
(B) <i>Partially Disabled</i>	558
GENERAL PRINCIPLES OF WORKING MEN'S ACT	560

CHAPTER X

PROCEDURE

PROCEEDINGS	596
NOTICE OF ACCIDENT	600
CLAIM FOR COMPENSATION	607
REQUEST FOR ARBITRATION	619
ARBITRATION	622
COSTS	642
THE MEMORANDUM	660
COUNTY COURT JURISDICTION	670
MEDICAL EXAMINATION AND MEDICAL REPORTS	675
EMPLOYER'S INDEMNITY UNDER SECT 6	687
DETENTION OF SHIPS	697
GENERAL PROVISIONS	702

APPENDICES

APPENDIX A

FORMS OF NOTICES NECESSARY UNDER THE EMPLOYERS' LIABILITY ACT 1880	707
---	-----

Table of Contents

xix

APPENDIX

	PAGE
THE WORKMEN'S COMPENSATION RULES, 1907	715
Forms	767
THE WORKMEN'S COMPENSATION RULES, 1908	836
Form	841
Order of the Treasury of May 30th, 1907, regulating Fees in County Courts	846
Order of the Secretary of State, dated May 22nd, 1907, extending the Provisions of the Workmen's Compensation Act, 1906, to certain Industrial Diseases	850
Regulations, dated June 21st, 1907, made by the Secretary of State and the Treasury as to the duties and fees of certifying and other surgeons, and as to references to, and remuneration and expenses of, Medical Referees in England and Wales under sect. 8 of the Act	852
Forms	859
Regulations, dated June 24th, 1907, made by the Secretary of State and the Treasury as to the duties and remuneration of Medical Referees in England and Wales under the provisions of the First and Second Schedules to the Workmen's Compensation Act, 1906	869
Forms	875
Regulations of the Secretary of State dated June 28th, 1907, as to examinations of a workman by a Medical Practitioner provided and paid by the employer under the provisions of the First Schedule to the Workmen's Compensation Act, 1906	883
Regulations, dated July 1st, 1907, made by the Chief Registrar of Friendly Societies under the Workmen's Compensation Act, 1906	884
Forms	886
WORKMEN'S COMPENSATION RULES, 1908 (No. 2)	895
INDEX	901

APPENDIX

EMPLOYERS LIABILITY ACT,
1880

APPENDIX A.

LOGS OF JOINT JOINT SURVEILLANCE AND TARGETING •
 LIABILITY ACT, 1991

“I

3. *Study of the effect of the concentration of the monomer on the molecular weight of the polymer.*

[illegible][illegible]

100

1. *What is the purpose of the study?*
 2. *What are the research questions or hypotheses?*
 3. *What is the significance of the study?*
 4. *What are the limitations of the study?*
 5. *What are the conclusions of the study?*

[illegible]

Dated this _____ day of _____ 19____,
Attest, etc.,

of No. _____, Block, in the parish of _____,
in the county of _____.

No. 3

Notice of Injury caused through the Negligence of Plaintiff in violation of Orders
of the Indiana Supreme Court in *Boyle v. Board of Directors of the*

I, A. B., of No. _____ street, in the parish of _____, in the county
of _____, do hereby give notice that, on the _____ day of _____, A. B.
_____ hereby states the nature of the injury caused, and the plaintiff states he
informs the undersigned of the nature of the complaint, and through the
negligence of the Board of Directors of the _____, and to whose order of
direction I was at the time of the accident occurred, and did conform
with the plaintiff's instructions, and did not intentionally commit,
were used in the building and action under the order of the _____
I concluded the _____ and the order of the _____ fell and was run
down, thereby causing my arm and other parts of my body to be injured, and
which injuries I claim compensation therefor.

Dated the _____ day of _____, 19____,
at _____, A. B.,
of _____ street, in the parish of _____,
in the county of _____.

No. 4

Notice of Injury caused through the Negligence of Plaintiff in violation of Orders
of the Indiana Supreme Court in *Boyle v. Board of Directors of the*

I, A. B., of No. _____ street, in the parish of _____, in the county
of _____, do hereby give notice that, on the _____ day of _____, A. B.
_____ hereby states the nature of the injury caused, and the plaintiff states he
informs the undersigned of the nature of the complaint, and through the
negligence of the Board of Directors of the _____, and to whose order of
direction I was at the time of the accident occurred, and did conform
with the plaintiff's instructions, and did not intentionally commit,
were used in the building and action under the order of the _____
I concluded the _____ and the order of the _____ fell and was run
down, thereby causing my arm and other parts of my body to be injured, and
which injuries I claim compensation therefor.

Dated the _____ day of _____, 19____,
at _____, A. B.,
of No. _____ street, in the parish of _____,
in the county of _____.

To Mr. _____

No. 4A

Notice under Impunity caused by acting in obedience to Particular
Instructions given by a Plaintiff to a person authorized and delegated in
that behalf.

I, the undersigned A. B., of No. _____ street, in the parish of _____,
in the county of _____, do give you notice that, on the _____

No. 10

Form of Notice of Plaintiff's Court, with demand of costs, etc.

In the _____ County Court
Between A. B., Plaintiff,
and
C. D., Defendant.

Take notice that the above-named defendant has paid the sum of \$_____ into Court in this action in satisfaction of the whole of the plaintiff's claim herein, or so much of the plaintiff's claim as relates to _____ any separate issue.

And further take notice that notwithstanding such payment the defendant does hereby admit _____

And further take notice that the address of the defendant is as follows:—
[State the address.]

Dated, etc.

C. D., the above-named defendant
or T. P., solicitor for the above-named
defendant.

To the Registrar
of the _____ County Court, and
to A. B., the above-named plaintiff.

No. 11.

Form of Special Defence of Plaintiff

In the _____ County Court
Between A. B., Plaintiff,
and
C. D., Defendant.

Take notice that the defendant intend at the hearing of this action to give in evidence on behalf of the following ground of defence _____

Dated this _____ day of _____ 19____

Signed for and by the defendant _____

That no notice of this defence was given to the defendant pursuant to O.A. 11 Vol. 1, 12, or 13.

Take notice that the defendant intend at the hearing of this action to set up a counterclaim against the plaintiff's demand, the particulars of which are annexed hereto.

Dated this _____ day of _____ 19____

Signed for defendant or solicitor, etc., etc.

No. 12.

Form of Application for New Trial.

In the _____ County Court
Between A. B., Plaintiff,
and
C. D., Defendant.

Take notice that on _____ the _____ 19____, an application will be made on behalf of the plaintiff or defendant at the sitting of the _____

APPENDIX B

STATUTORY RULES AND ORDERS, 1907

No. 133 L. II

MASTER AND SERVANT Workmen's Compensation Act, 1906

Proclamation in Council of the Statutory Rules, 1907. Declared by the Privy Council of India, 1907.

The Workmen's Compensation Rules, 1898, the Workmen's Compensation Rules, 1899, and the Workmen's Compensation Rules, 1900, ^{has been} ~~has been~~ are hereby annulled, but shall continue to apply to cases where the accident happened before the commencement of the Workmen's Compensation Act, 1906, except so far as the provisions of that Act and of these Rules as the Rules relate to reference to medical referees and proceedings consequential thereon apply to those cases.

Proclamation

1. (1) The following Rules shall have effect under the Workmen's Compensation Act, 1906, on these Rules referred to as the Act, with ^{full com-} ~~reference to any matter or proceeding for the regulation of which~~ ^{mencement, and} ~~reference to any matter or proceeding for the regulation of which~~ ^{Rule} ~~reference to any matter or proceeding for the regulation of which~~ ^{construction of} ~~reference to any matter or proceeding for the regulation of which~~ ^{the Act into effect so far as it affects the County Court or an arbitrator} ~~reference to any matter or proceeding for the regulation of which~~ ^{appointed by the judge of the County Court and proceedings in the} ~~reference to any matter or proceeding for the regulation of which~~ ^{County Court or before any such arbitrator.}

2. These Rules may be cited as the Workmen's Compensation Rules, 1907, and shall come into operation on the first day of July one thousand nine hundred and seven, but they shall not, except so far as they relate to references to medical referees and proceedings consequential thereon, apply to any case where the accident happened before the commencement of the Act.

3. Expressions used in these Rules shall have the same meaning as the same expressions used in the Act.

§2 A. 11 A. 61
c. 61

(1) The Interpretation Act, 1889, shall apply for the purpose of the interpretation of these Rules as it applies for the purpose of the interpretation of an Act of Parliament.

(2) These Rules shall also be read and construed with the County Court Rules, 1903, and the County Court Rules of subsequent date amending the same, and any Order and Rule referred to by number in these Rules shall mean the Order and Rule so numbered in the County Court Rules, 1903, or in any County Court Rules of subsequent date, as the case may be.

Part C. In Arbitration between Employer and Workmen appointed by Judge

Part C. In
arbitration

2. (1) When application is made for the settlement by the judge or by an arbitrator appointed by the judge of any matter which under the Act is to be settled by arbitration, the party making such application shall be called "the applicant" and subject to these Rules, all other persons whose presence at the arbitration may be necessary to enable the judge or arbitrator effectively and completely to adjudicate upon and settle all the questions involved shall be made parties to the arbitration and shall be called "the respondents".

Order III,
Rule 2

(2) In any case in which both the parties are defined by the Act and a contractor with him are entitled to be liable to pay compensation under the Act, Order III, Rule 2, and the number of parties shall apply.

Number of
applicant
Order III,
Rule 1,
Order XIX,
Rules 1, 1A

3. More persons than one may be joined as applicants in one arbitration in any case in which such persons might be joined in one action as plaintiffs under Order III, Rule 1, and that Rule and Rules 18 and 19 of Order XIX, shall with the necessary modifications apply to any such arbitration.

Applicants by
dependants

4. (1) An application on behalf of the dependants of a deceased workman for the settlement by arbitration of the amount payable as compensation to such dependants may be made by the legal personal representative of any of the deceased workman on behalf of such dependants or by the dependants themselves, and in either case the particulars to be filed as hereinafter mentioned shall contain particulars as to the dependants on whose behalf the application is made.

(2) Provided that if there is any conflict of interest between the dependant themselves or if any dependants neglect or refuse to join in an application, the application may be made by or on behalf of some only of such dependants, the other dependants in either case being named as respondents.

(3) In the construction of this rule the term "dependants" shall

include persons who claim or may be entitled to claim to be dependants but as to whose claim to rank as dependants any question arises.

5 (1) In any case in which the amount payable in compensation ^{to dependants} ^{under Act, first} ^{Schedule, par. 8,} ^{value amount of} ^{provided or} ^{ascertained} to the dependants of a deceased workman has been agreed upon or ascertained but any question arises as to who are dependants or as to the amount payable to each dependant an application for the settlement of such question by arbitration may be made either by the legal personal representative of any of the deceased workman on behalf of the dependants or any of them or by such dependants or any of them against the other dependants and the persons claiming or who may be entitled to claim to be dependant but as to whose claim to rank as such a question arises or such application may be made by the persons claiming to be dependant but as to whose claim to rank as such a question arises or any of them against the legal personal representative of any of the deceased workman and the dependants and such of the persons claiming or who may be entitled to claim to be dependants as are not applicant.

(2) In any such case if the employer has paid the agreed or ascertained amount of compensation it shall not be necessary to make him a respondent but if such compensation or any part thereof is still in his hand he shall be made a respondent.

(3) The employer if made a respondent may pay the amount of compensation in his hand into court to be dealt with as the judge or arbitrator shall direct and thereupon further proceedings against him shall be stayed.

6 (1) An application for the settlement by arbitration of the sum payable in respect of medical attendance on and the funeral of a deceased workman who leaves no dependants shall be made by the legal personal representative of any of the deceased workman. If there is no such legal personal representative the application may be made by any person to whom any such expenses are due. In the latter case any other person known to the applicant as a person to whom any such expenses are due shall be joined in the application either as applicant or respondent.

(2) In any case in which application is made for the settlement by arbitration of such amount the amount awarded if insufficient for the payment of such expenses in full shall be apportioned between the persons to whom such expenses are due in such manner as the judge or arbitrator shall direct.

7 The provisions of Rules 7 and 8 of Order III as to parties parties making or defending on behalf of other persons having the same interest parties,

representation of
parties having
the same
interest

and the provisions of the County Court Rules as to persons under disability and partners suing and being sued shall with the necessary modifications apply to proceedings by way of arbitration under the Act

Application for Arbitration

Request for
arbitration

8 (1) An application for the settlement of any matter by arbitration shall not be made unless and until some question has arisen between the parties and such question has not been settled by agreement

(2) Where any question has arisen and has not been settled by agreement an application for the settlement of the matter by arbitration shall be made by the applicant filing with the registrar a request for arbitration intitled in the matter of the Act and in the matter of the arbitration which request shall state concisely the question which has arisen and shall with the subsequent proceedings thereon be recorded in the special register to be kept as mentioned

Particulars

(3) Particulars shall be appended or annexed to the request containing

(a) A concise statement of the circumstances under which the application is made and the relief or order which the applicant claims

(b) The date of service of notice of the accident on the employer or if such notice has not been served the reason for such omission and

(c) The full names and addresses of the respondents and of the applicant and of the arbitrator if the proceedings are commenced through solicitors

Forms of
request and
particulars
Forms 1 to 11

9 (1) The request and particulars shall be according to such one of the forms in the Appendix as shall be applicable to the case with such modifications as the nature of the case may require

(2) A copy of the notice of the accident shall be appended or annexed to the particulars If this rule cannot be complied with the reason for the omission shall be stated in the particulars

Application by
employer

10 (1) Where an employer on whom a claim for compensation has been made desires to make an application for the settlement of any matter by arbitration he shall file a request for arbitration in accordance with Rule 8 to which the workman or the local personal representative if any and the persons claiming or who may be entitled to claim to be dependants of a deceased workman or the other persons as the case may be on whose behalf the claim was made shall be respondents

(2) Particulars shall be appended or annexed to the request containing

- (a) a concise statement of the circumstances under which the application is made
- (b) a statement whether the applicant denies his liability to pay compensation or denies such liability wholly or partially, with or without the latter case a statement of the grounds on and extent to which he denies liability
- (c) a statement of the matters which the applicant desires to have settled by arbitration; and
- (d) the full names and addresses of the respondent and of the applicant and of his solicitor at the preceding proceedings and of the counsel through whom solicited.

11. The applicant shall deliver to the court with the request (except and particular) a copy thereof for the judge or arbitrator and a copy to parties to each respondent to be served.

12. Where the applicant is able and unable to furnish the ^{where applicable} required information in writing the request and particular and copy shall be filled up by the court as directed.

Procedure in Arbitration before Judge *Procedure before Arbitrator*

13. (1) On the filing of a request for arbitration the court may (except by ^{in person} order) shall transmit copies of the request and particular to the judge who shall, as soon as conveniently may be, be directed to settle the matter himself or appoint a day and hour for proceeding with the arbitration. Such day shall be so fixed as to allow the copies of the request and particular to be served on the respondent at least twenty clear days before the day so fixed.

(2) The arbitration shall, except as hereinafter mentioned, be held at the place at which the court is held.

(3) Provided that the judge may direct that the arbitration shall be held at any other place within the district of the court on application that is well made by any party to the arbitration and on such satisfaction of the judge as to provide at his own expense a place to the satisfaction of the judge in which the arbitration may be held and to pay the necessary expenses of the judge and officers of the court attending at such place.

(c) If such direction is given before the notices mentioned in the next following rule are issued, the registrar shall insert in such notices the place at which the arbitration has been so directed to be held.

(c) If such direction is given after such notices have been issued, the registrar shall forthwith send notice by post to the parties of the place at which the arbitration has been so directed to be held.

Notice of Request

Notice to
parties

Forms 12, 13

Notice where
employer is
applicant
Form 13

14. (1) On the day for proceeding with an arbitration being fixed, the registrar shall give or send by post notice in writing to the applicant stating the place at which and the day and hour on and at which the arbitration will be proceeded with, and shall issue the copies of the request and particulars under the seal of the court for service on the respondent, together with notices signed by the registrar himself and under the seal of the court stating the place at which and the day and hour on and at which the arbitration will be proceeded with, and that if the respondents do not attend in person or by their solicitors, such order will be made and proceeding taken as the judge may think just and expedient.

(2) Where the request is filed by an employer, the notices to be served on the respondents shall be modified by the omission of the words therein relating to the denial or admission of liability to pay compensation.

Service on Respondent

Service on
respondents

15. (1) The copies and notices mentioned in the last preceding rule shall be served on the respondents at least twenty clear days before the day fixed for proceeding with the arbitration.

(2) The copies and notices mentioned in the last preceding rule may be served—

- (a) By a bailiff of a court
- or, at the request of the applicant or his solicitor
- (b) By the applicant or some clerk or servant of his permanent and exclusive employ, or
- (c) By the applicant's solicitor or a solicitor acting as agent for such solicitor, or some person in the employ of either of them, or some person employed by either of them to serve such copies and notices, who might be so employed to serve a writ in an action in the High Court.

(3) Service may be effected either in accordance with the rules as to service of default summonses or by registered post in accordance with the provisions of subsections 3 and 4 of section 2 of the Act with reference to service of notice in respect of an injury, and the provisions of those subsections shall apply to such service.

(4) Where service is effected otherwise than by a bailiff, a copy of the document served with the date and mode of service, endorsed thereon shall within three days next after the date of service of such document further time as may be allowed by the registrar of the court issuing such document be delivered or transmitted to such registrar by the applicant. The applicant shall also unless the respondent files an answer after the time limit for filing an answer deliver or transmit to the registrar an affidavit of the service of such document according to Form 47 in the Appendix to the County Court Rules with such variations as the circumstances of the case may require.

(5) Where a document is served by post it shall unless the contrary be proved be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post, and in proving the service of such document it shall be sufficient to prove that the same was properly addressed and registered.

(6) Where the accident occurred in England and any respondent resides in Scotland or Ireland service on such respondent may be effected in accordance with this rule and service so effected shall be deemed to be sufficient.

Stay of Proceedings

16. When several requests for arbitration are filed by different applicants in respect of the same respondent in the same court in respect of matters arising out of the same circumstances the respondent may or may not undertake to be bound so far as his liability to pay compensation is concerned by the award in such one of the arbitrations as may be selected by the judge. Any of the provisions of Order VIII, Rule 2 for proceedings in the arbitrations other than the one so selected until an award is made in such selected arbitration, and Rule 2 to 6 of Order VIII¹ shall with the necessary modifications apply accordingly.

Absence by Respondent

17. (1) If any respondent desires to disclaim any interest in the subject-matter of an arbitration or considers that the applicant's particulars are in any respect inaccurate or incomplete, or desires to

Form 11
 6
 being any fact or document to the notice of the judge or intends to rely on the fact that notice of the accident or of death, disablement, or suspension, was not given as required by the Act, or that the claim for compensation was not made within the time limited by the Act, or intends to deny (wholly or partially) his liability to pay compensation under the Act he shall ten clear days at least before the day fixed for proceeding with the arbitration file with the registrar an answer stating his name and address and the name and address of his solicitor (if any) and stating that he disclaims any interest in the subject-matter of the arbitration or stating in what respect the applicant's particulars are incomplete or incomplete, or stating concisely any fact or document which he desires to bring to the notice of the judge or on which he intends to rely, or the grounds on and extent to which he denies liability.

12. The respondent shall within seven clear days thereafter for the applicant and the judge, and one copy for each of the other respondents, and the registrar shall within twenty-four hours after receiving such copy transmit the same by post to the applicant and the judge and the other respondents respectively.

13. Subject to any order made and to the provision of the next following paragraph the applicant's particulars and in the case of a claim for compensation the liability to pay compensation under the Act shall be taken to be admitted.

14. Provided that in case of non-compliance with this rule, and of the applicant's non-contenting at the arbitration to permit a respondent to avail himself of any matter of which he should pursuant to this rule have given notice by filing an answer, the judge may on such terms as he shall think fit either proceed with the arbitration and allow the respondent to avail himself of such matter or adjourn the arbitration to enable the respondent to file such answer.

Answer to be
 completed by
 applicant

15. The provision of this rule shall with the necessary modifications apply to a case in which a request for arbitration is filed by an employer, but a respondent who fails to file an answer shall not be taken to admit the truth of any statement in the applicant's particulars in which he denies wholly or partially his liability to pay compensation.

Submissions to be made by Applicant who Contests by Respondent

Submissions to be
 made on behalf of
 respondent by
 respondent

18. (1) Where a respondent from whom compensation is claimed admits liability he may at any time before the day fixed for proceeding with the arbitration—

(a) Where the application is made by or injured workmen file with the registrar a notice that the respondent submits to an award for the payment of a weekly sum to be specified in such notice; or

(b) Where the application is made on behalf of the dependant of a deceased workman or for the settlement of the sum payable in respect of medical attendance on and the burial of a deceased workman who leaves no dependants, pay into court such sum of money as the respondent considers sufficient to cover his liability in the circumstances of the case.

(2) The registrar shall within twenty-four hours from the time from date of any notice filed or payment made pay and to the clerk proceeding for a copy and notice thereof with which a notice is filed a copy of such notice to the applicant and to the other respondents (if any).

(3) If the applicant is a workman and elects to accept in satisfaction of his claim the weekly payment specified in the respondent's ^{offer of} ~~notice~~ ^{offer of} notice he shall send to the registrar and to the respondent by post ^{before} ~~before~~ or leave at the registrar's office and at the residence or place of business of the respondent a written notice according to the form in the Appendix within such reasonable time before the day fixed for proceeding with the arbitration as the time of filing of notice of arbitration by the respondent has permitted.

(4) If the application for arbitration is made on behalf of the ^{dependant} ~~dependant~~ of a deceased workman or for the settlement of the sum ^{payable} ~~payable~~ payable in respect of medical attendance and burial of a dead and ^{if} ~~if~~ the applicant is willing to accept the sum paid into court in satisfaction of the compensation payable to the dependant or in respect of such medical attendance and burial as the case may be, he shall send to the registrar and to the respondent by post or leave at the registrar's office and at the residence or place of business of the respondent a written notice of such willingness according to the form in the Appendix within such reasonable time before the day fixed for proceeding with the arbitration as the time of payment into court by the respondent has permitted.

If there are any other respondents the applicant shall in like manner give notice of such willingness to such respondents; and if any of such respondents are willing to accept the sum paid into court in satisfaction of such compensation as aforesaid they shall in like manner give notice of such willingness to the registrar and to the applicant and the other respondents.

Procedure if weekly payment offered or sum paid in is accepted	<p>(5) If the applicant is a workman and elects to accept in satisfaction of his claim the weekly payment submitted to by the respondent or if in any other case the applicant and all the respondents give notice of their willingness to accept the sum paid into court the following provisions shall apply:</p> <p>(a) Where the respondent submits to an award for the payment of a weekly sum the judge may on application made to him in or out of court forthwith make an award directing payment of such weekly sum accordingly.</p> <p>(b) Where the respondent has paid money into court further proceedings at suit such respondent shall be stayed except as hereafter mentioned: and</p> <p>(c) If the applicant and the other respondents agree as to the apportionment and application of such sum the judge may on application made to him in or out of court on behalf of or with the consent of all such parties forthwith make an award for such apportionment and application.</p> <p>(d) In any other case the arbitration may proceed as between the applicant and the other respondent.</p>
Costs payable by respondent	<p>(6) In any such case the judge may in his discretion by his award order the respondent filing notice of submission to an award or paying money into court to pay such costs as the applicant and the other respondents or any of them may have properly incurred before the receipt of notice of submission to an award or payment into court including if the judge on consideration of the facts of the case shall so order any sums which might have been allowed by order of the judge at the hearing of the arbitration.</p>
Form 15	<p>(7) If the applicant or any respondent intends to apply for any such costs he shall give notice of his intention in his notice of acceptance according to the form in the Appendix or where the time of filing notice of submission to an award or the time of payment into court by the respondent does not permit of notice of acceptance being given the applicant or any respondent may apply for such costs without giving such notice.</p>
Acceptance at any time before arbitration opened	<p>(8) Where any party has not given notice of acceptance in accordance with this rule he may nevertheless accept the weekly payment which the respondent has submitted to pay or the sum paid into court at any time before the arbitration is called on and opened.</p>

subject to the payment of any costs which may have been reasonably incurred by the respondent since the date of filing notice of submission on the date of payment into court and which may be allowed by the judge, and the judge may order any costs so allowed to be paid by the party so accepting, and may order such costs to be set off against any costs payable to such party or to be deducted from any weekly payment or compensation awarded to such party.

17. In default of notice of acceptance by the applicant and all the respondents the arbitration may proceed, but if no order for weekly payment or compensation is awarded then that which the respondent has submitted to pay or has paid into court, whichever is the less, shall not be liable to pay any further costs than such as he might have been ordered to pay if the weekly payment offered or sum paid into court had been accepted, and the judge may order any costs incurred by such respondent after notice of submission to an award or payment into court to be paid by any party who has not given notice of acceptance of such weekly payment or sum, and may order such costs to be set off against any cost payable to such party or to be deducted from any weekly payment or compensation awarded to such party. The judge may also order any costs incurred after notice of payment into court by any party who has given notice of acceptance to be paid by any other party who has not given such notice, and to be deducted from any compensation awarded to such last mentioned party.

18. The provisions of this rule shall with the necessary modification apply to a case in which an employer who has filed a request for arbitration admits liability to pay compensation.

Notice to Parties concerning the Rules to be observed in the arbitration

19. Where a respondent claims to be entitled under section 1 of the Act to indemnity, he must, any person not a party to the arbitration, he shall ten clear days at least before the day fixed for proceeding with the arbitration, file a notice of his claim according to the form in the Appendix, and the registrar shall send such notice and deliver a copy of the applicant's request and particulars, and of the notice served on the respondent under Rules 14 and 15, upon the person against whom such claim is made, and the provisions of paragraphs 2 to 6 of Rule 15 shall apply to such service.

20. If any person served with a notice under the last preceding rule (hereinafter called the third party) desires to dispute the applicant's claim in the arbitration as against the respondent on

whose behalf the notice has been given or his own liability to such respondent he must appear before the judge on the day fixed for proceeding with the arbitration or on any day to which he may have received notice from the arbitrator that the arbitration has been adjourned or postponed and in default of his so doing he shall be deemed to admit the validity of any award made against such respondent as to any matter which the judge has jurisdiction to decide in the arbitration and between the applicant and the respondent whether such award is made by consent or otherwise and his own liability to indemnify the respondent to the extent claimed in the notice served on him by the respondent.

Where notice
not given in
due time

Provided that if it appears to the judge before or at the arbitration that the notice of claim has not been served on the third party in time to enable him to appear on the day before mentioned or that for any other sufficient cause the third party is unable to appear on such day the judge may adjourn the proceedings in the arbitration on such terms as to costs and otherwise as may be just.

Proceedings
adjourned
appears to
third party

21 If the third party fails to appear on the day mentioned in Rule 20 or if the proceedings are adjourned under that rule on the day to which the proceedings are adjourned then if the arbitration results in an award in favour of the applicant on the arbitration finally decided in favour of the applicant otherwise than by award of the judge may on the application of the respondent make such award as the nature of the case may require in favour of the respondent against the third party but execution thereon shall not issue without leave of the judge until after satisfaction by the respondent of the award against him or the amount recovered against him.

Provided that the judge may at issue or vary any award made against the third party under this rule upon such terms as may be just.

Application for
directions
When directions
may be given

22 The third party or the respondent may apply before or at the arbitration to the judge for directions and the judge upon the hearing of the application may if satisfied that there is a question proper to be determined as to the liability of the third party to make the indemnity claimed in whole or in part order the question of such liability as between the third party and the respondent giving the notice to be determined at or after the arbitration and if not so satisfied may make such award as the nature of the case may require in favour of the respondent giving the notice against the third party or the judge may if it appears desirable so to do give the third party leave to resist the claim of the applicant against the respondent upon such terms as may be just or to appear at the arbitration and take such

part therein as may be just, and generally may give such directions as he may think proper for having the question most conveniently determined, and as to the mode or extent in or to which the third party shall be bound or made liable by the award in the arbitration.

23. The judge may decide all questions of cost between a third party and the other parties to the arbitration, and may order any one or more to pay the costs of any other or others, or give such directions as to costs as the justice of the case may require.

Notice to Third Parties to Appear before the Arbitration Judge.

21. (1) Where a respondent claims that a compensation is payable to him covered by an Act or otherwise, he will be entitled under section 6 of the Act to claim that he is not liable to indemnify a third party, and if he does not appear to the arbitration he shall be deemed to have accepted the claim in accordance with Rule 19.

(2) If any person served with a notice under the last preceding paragraph, hereinafter called the third party, desires to dispute the liability of the respondent to indemnify him, he must appear before the arbitration judge on the day fixed for proceeding with the arbitration or on any day to which he may have received notice from the arbitration that the arbitration has been adjourned or postponed, and in default of his so doing he shall be deemed to admit the validity of any award made against such respondent as to any matter which the judge has jurisdiction to decide in the arbitration as between the applicant and the respondent, whether such award is made by consent or otherwise.

Provided that if it appears to the judge before or at the arbitration that the notice of claim has not been served on the third party in time to enable him to appear on the day hereinbefore mentioned, or that for any other sufficient cause the third party is unable to appear on such day, the judge may adjourn the proceedings in the arbitration on such terms as to costs or otherwise as may be just.

(3) The third party or the respondent may apply before or at the arbitration to the judge for directions, and the judge upon the hearing of the application may, if it appears desirable so to do, give the third party leave to resist the claim of the applicant against the respondent upon such terms as may be just, or to appear at the arbitration and take such part therein as may be just, and generally may give such directions as he shall think proper.

Costs

(1) If the third party obtains leave to resist the claim of the applicant against the respondent, the provisions of Rule 23 as to costs shall apply.

Indicates that employer has decided questions as to liability of third party.

(2) Nothing in this Rule shall empower the judge to decide otherwise than by consent any question as to the liability of the third party to indemnify the respondent or to make an award in favour of the respondent against the third party, or to make any further or other order than that the third party shall not be entitled in any future proceedings between the respondent and such third party to dispute the validity of the award as to any matter which the judge has jurisdiction to decide in the arbitration as between the applicant and the respondent.

(3) Provided that with the consent of the respondent and the third party:

(a) If the arbitration results in an award in favour of the applicant or is finally decided in favour of the applicant otherwise than by an award and the third party admits his liability to indemnify the respondent the judge may on application made to him at or after the hearing of the arbitration or the final decision thereof make such award as the nature of the case may require in favour of the respondent against the third party, but execution thereof shall not issue without leave of the judge until after satisfaction by the respondent of the award and fulfilment of the amount recovered claim thereon.

(b) The judge may on an application for directions order any question as to the liability of the third party to make the indemnity claimed to be settled as between the respondent and the third party by arbitration after the arbitration between the applicant and the respondent and may on such subsequent arbitration make such award as the nature of the case may require in favour of either party against the other.

(c) In any such case the judge may decide all questions of costs as between the respondent and the third party and may order either of such parties to pay the costs of the other including any costs payable by such party to any other party to the arbitration or give such directions as to such costs as the justice of the case may require.

Third Party Proceed where Employer is Applicant

Third party procedure where employer is applicant.

25 The provisions of Rules 20 to 21 shall with the necessary modifications apply to a case in which an employer who has filed a

Workmen's Compensation Rules, 1907

request for arbitration claims to be entitled to indemnity against any person not a party to the arbitration

Claim to Indemnity as between Respondent

26 (1) Where a respondent claims to be entitled to indemnity ^{to be taken only as facts on} against any other respondent a like notice shall be issued and the like procedure shall thereupon be adopted for the determination of questions ^{or respondents} between the respondents as might be issued and adopted against such other respondent if such last-mentioned respondent were a third party

(2) Nothing herein contained shall prejudice the rights of the applicant against any respondent

Procedure on Arbitration

27 (1) Subject to the special provisions of these Rules the procedure in arbitration shall be the same as the procedure in an action commenced in the County Court by plaint and summons in the ordinary way and determined by the judge without a jury and the statutory provisions and rules for the time being in force relating to such actions shall with the necessary modifications apply to such arbitration accordingly and in the application of such provisions and rules the applicant's request for arbitration shall be deemed to be a summons with particulars annexed, the day fixed for proceeding with the arbitration shall be deemed to be the return day and the applicant and respondents shall be deemed to be plaintiff and defendants respectively

(2) Provided that the burden of proof of any facts which are not admitted shall be the same whoever the party may be by whom the request for arbitration is filed ^{burden of proof of facts not admitted}

Award

28 (1) The award of the judge on any arbitration shall be prepared ^{Award} and settled by the registrar and shall be signed by the judge, and ^{Form 24} shall be sealed and filed and sealed copies thereof shall be served on all persons affected thereby in accordance with Rule 7 of Order XXIII, and such award shall be enforceable in the same manner as a judgment ^{Rule 7} or order of the court

(2) The judge shall have power at any time to correct any clerical mistake or error in such award arising from any accidental slip or omission

B.E.L.

*Proceedings before Arbitrator appointed by Judge**Appointment of Arbitrator by Judge*

Appointment
of arbitrator by
Judge

20 With respect to the appointment of an arbitrator by the judge the following provisions shall apply

- (a) If with respect to any court the Lord Chancellor by general order authorises the settlement by an arbitrator appointed by the judge of matters which in default of such authorisation would be settled by the judge the judge may from time to time on an application being made for the settlement of any matter, either settle the same himself, or he may with the approval of the Lord Chancellor appoint by writing under his hand and filed in the court an arbitrator to settle such matter
- (b) If with respect to any court the Lord Chancellor makes no such general order as aforesaid then on an application being made for the settlement of any matter the judge may if from the state of business in the court or for any other reason he is unable to settle such matter within a reasonable time apply to the Lord Chancellor to authorise the settlement of such matter by an arbitrator appointed by the judge
- (c) If the Lord Chancellor does not grant such authority, the judge shall proceed to settle the matter in accordance with the Act and these Rules
- (d) If the Lord Chancellor grants such authority the judge may with the approval of the Lord Chancellor appoint by writing under his hand and filed in the court an arbitrator to settle such matter
- (e) In case of the death or refusal or inability to act of an arbitrator appointed under this rule, the judge may on the application of any party, appoint a new arbitrator in accordance with this rule

• *Fixing day for Arbitration*

Fixing day
and place for
proceedings
before arbitrator

30. Where any matter is to be settled by an arbitrator, the judge shall return the copy of the request for arbitration to the registrar, with the appointment of such arbitrator to be transmitted to the arbitrator and the registrar shall transmit the copy of the request and a copy of the appointment to the arbitrator, who shall as soon as conveniently may be, appoint a day and hour for proceeding with

the arbitration in accordance with Rule 13 and the provisions of that rule as to the place where an arbitration shall be held shall apply. Provided that where the arbitration is to be held at the place where the court is held the day appointed for the arbitration shall, if possible, be one on which the court or other suitable accommodation in the court-house will be available for the arbitration.

Procedure before Arbitrator

31. (1) On the day for proceeding with an arbitration being fixed the registrar shall proceed according to Rule 14 and thereafter the arbitration shall proceed in the same manner as an arbitration before the judge and these Rules shall apply and the officers of the court shall act accordingly with the substitution of the arbitrator for the judge.

Procedure before arbitrator

(2) Provided that

(a) In any case coming within the provisions of paragraph 5 (a) or paragraph 5 (b) (i) of Rule 18 or in any other case in which, after an arbitrator has been appointed but before the day fixed for proceeding with the arbitration the parties agree upon an award the judge may on application made to him in or out of court on behalf of or with the consent of all parties settle the matter himself and thereupon the function of the arbitrator as to such matter shall cease, and the registrar shall forthwith inform him that the matter has been settled, and

(b) Any application for the enforcement of or for staying proceedings on an award which would in the case of an award made by the judge be required to be made to the judge shall in the case of an award made by an arbitrator, be in like manner made to the judge.

Submission of Question of Law by Committee or Arbitrator to Judge

32. (1) Where a committee or an arbitrator (whether agreed on by the parties or appointed by the judge) submits any question of law for the decision of the judge under paragraph 1 of the second schedule to the Act such submission shall be in the form of a special case.

question of law by committee or arbitrator to judge
Act, Sched 2, para 4

(2) The case shall be intitled in the manner of the Act and of the arbitration, and shall be divided into paragraphs numbered consecutively, and shall state concisely such facts and documents as may be necessary to enable the judge to decide the questions of law.

statement of facts

	<p>raised thereby. Upon the argument of the case the judge and the parties shall be at liberty to refer to the whole contents of such documents and the judge shall be at liberty to draw from the facts and documents stated in the case any inference whether of fact or of law which might have been drawn therefrom if proved at the hearing of an arbitration.</p>
<p>Time day for hearing Form 25</p>	<p>(b) The case shall be signed by the chairman and secretary of the committee or by the arbitrator and sent to the registrar who shall transmit the same to the judge and the judge shall as soon as conveniently may be appoint a day and hour for hearing the case and instruct the registrar to give notice thereof forthwith to the parties. The day shall be so fixed as to allow notice to be given ten days at least before the day fixed for the hearing unless the judge shall with the consent of all parties fix an earlier day.</p>
<p>Copies of case</p>	<p>(c) The registrar shall on the application and at the cost of any party furnish him with a copy of the case.</p>
<p>Power of judge on hearing of case</p>	<p>(d) On the hearing of the case the judge may after deciding the question submitted to him remit the case with a memorandum of his decision to the committee or arbitrator for them or him to proceed thereon in accordance with the decision or if the decision of the judge on the question submitted to him disposes of the whole matter, he may himself make an award in the arbitration in accordance with such decision.</p>
<p>Re-argument</p>	<p>(e) The judge may remit the case to the committee or arbitrator for re-statement or further statement.</p>
<p>Costs of special case</p>	<p>(f) The judge shall have the same power over the costs of a special case as he has over the costs of an arbitration or he may direct that such costs shall be dealt with as costs attending the arbitration, and the provisions of the Act and these Rules as to such costs shall apply accordingly.</p>

Appearance of Parties in Arbitration

<p>Appearance of parties</p>	<p>33 (1) A party to any arbitration under the Act may appear -</p>
	<p>(a) In person</p>
	<p>(b) By any solicitor who would be entitled to appear for such party in an action in the County Court</p>
	<p>(c) By counsel</p>
	<p>Or by leave of the judge or arbitrator a party may appear</p>
	<p>(d) By a member of his family</p>

- (a) By a person in the permanent and exclusive employment of such party.
 - (b) In the case of a company or corporation by any director of the company or corporation or by the secretary or any other officer or any person in the permanent and exclusive employment of the company or corporation.
 - (c) By any officer or member of any society or other body of persons of which such party is a member or with which he is connected or
 - (d) Under special circumstances by any other person.
- (2) No person other than a solicitor who appears or acts on behalf of any party in any arbitration under the Act shall be entitled to have or recover any fee or reward for so appearing or acting other than such travelling expenses and in the case of a solicitor or a member of his family allowance for time spent inasmuch as may be allowed by the judge or arbitrator. Provided that nothing in these rules contained shall affect the right or consent to appear or act in any arbitration or the right of any solicitor to recover costs in respect of his employment or consent to appear or act as above and

Provision for Appeal to the High Court

34. At the hearing of any arbitration or special case the judge or arbitrator shall make a note of any question of law raised and of the facts in dispute and of the evidence in relation thereto and of his decision thereon and of his decision in the arbitration or on the hearing of the case and he shall at the expense of any party to such arbitration or case furnish a copy of the note so taken to or allow a copy of the same to be taken by or on behalf of such party and shall sign such copy whether a notice of motion by way of appeal has been served or not.

Provision for Appeal to the High Court (continued)

35. (1) Where under section 5 of the Act the rights of an employer against any insurers under a contract entered into by the employer with the insurers in respect of any liability under the Act or under any contract with any workman are transferred to and vest in the workman the following provisions shall have effect:

- (2) Where a workman who is or claims to be entitled to compensation from an employer to whom section 5 of the Act applies is unable to ascertain whether such employer has entered into a contract with insurers in respect of his liability he may apply to the court on

Order XXX, Rules 71, 72

affidavit intitled in the matter of the Act, and setting forth the facts on which the application is made, for an order for the examination of the employer and the company in like an order accordingly and the provisions of Order XXX Rule 71 and 72 shall apply in the same manner as if the employer were a debtor liable under a judgment or order

Provisions as to arbitration from 11.

(3) The provisions of the Act and these Rules as to the settlement of matters by arbitration shall with the necessary modifications apply to the settlement by arbitration of any question as to the liability of the insurers or the amount of their liability

Masters, Seamen, Apprentices and Pilots Section 7

Masters, seamen, apprentices, and pilots

38 (1) In the application of the Act and these Rules in the case of masters, seamen and apprentices to the sea service and apprentices in the sea fishing service who are workmen within the meaning of the Act and who are members of the crew of any such ship as in section 7 of the Act mentioned and to pilots when employed on any such ship the following provisions shall have effect

Claim for compensation in case of death

(2) In the case of the death of a master, seaman, apprentice or pilot the claim for compensation shall state the date at which news of the death was received by the claimant

Where master, etc., lost with ship

(3) The claim for compensation on behalf of dependants of a master, seaman, apprentice or pilot lost with his ship and the particulars appended or annexed to the request for arbitration shall state the date at which the ship was lost or is deemed to have been lost

Form of request for arbitration, Form 6, 7

(4) A request for arbitration shall be according to such one of the forms in the Appendix as shall be applicable to the case with such modifications as the nature of the case shall require

Description of owners in course of and proceedings

(5) In any document, notice or proceeding it shall be sufficient to describe the owners of the ship as the owners of the ship and the provisions of the County Court Rules as to disclosure of the names of partners shall with the necessary modifications apply to the disclosure of the names of such owners

Service of documents and proceedings Merchant Shipping Act, 1894, ss. 70, 60b

(6) Subject to the provisions of paragraph (a) of section 7 of the Act as to service of the notice of accident and the claim for compensation, any document, notice or proceeding to be served on the owners of a ship shall be deemed to be sufficiently served if served on the managing owner or manager for the time being of the ship or (except where the master is claiming compensation) on the master of the ship and section 60b of the Merchant Shipping Act, 1894 sub-section (1).

shall apply to service on the master of the ship and where the master is claiming compensation and there is no managing owner of the ship, service may be effected in accordance with paragraph (c) of the said subsection.

Detention of Ship. Section 11.

(1) An application for an order for the detention of a ship under ^{Application for} section 11 of the Act shall be made in accordance with the rules for ^{detention of} ship ^{the time being in force under the Shipowners' Negligence Remedies) Act, 1907} and those rules, with the necessary modifications, shall ^{of the Act} apply accordingly.

(2) Subject to any such rules as in the last preceding paragraph mentioned, an application for an order for detention shall be made in accordance with the following rules:

(3) The application may, subject to the provisions of paragraph (9) ^{Application and} of this rule, be made *ex parte* either in or out of court according to ^{the form of} the form in the Appendix and shall be supported by affidavit or other ^{Form 26} evidence shown to the satisfaction of the judge the grounds on which the application is made.

(4) The judge may, before granting the application, require the applicant to give or procure an undertaking to the satisfaction of the judge, to abide by any order as to damages and costs which may be ^{to be made as} the order made in case any person affected by the order for detention shall sustain any damages by reason of the order which the applicant ought to pay.

(5) An order for detention shall specify the amount for which order and security shall be given and shall be according to the form in the ^{Appendix} Appendix and shall be issued in triplicate; one copy shall be delivered ^{Form 27} to the applicant and the other two copies to the officer named by the judge; and one of such last-mentioned copies shall be delivered by the officer to the person who is at the time of the execution of the order apparently in charge of the ship or, if there is no person apparently in charge, shall be nailed or affixed on the main mast or on the starboard mast of the ship, and the other copy shall be retained by the officer.

(6) The judge may at any time on good cause shown rescind any order for detention made by him.

(7) The provisions of sections 108 and 109 of the County Courts ^{County Courts} Act, 1888, and of Order XXIX ^{Act, 1888, as} as to security shall with the necessary ^{108, 109} modifications apply to the giving of security and the approval by the ^{Order XXIX} Order XXIX.

Form 29	judge of any security shall be signified in writing signed by him. Where security is given by bond such bond shall be according to the form in the Appendix.
Release	(8) If the judge rescinds any order for detention or is satisfied that satisfaction has been made or when security has been given and approved or in any other case if the applicant so requires the judge shall deliver to the party applying for the same an order according to the form in the Appendix directed to the officer named in the order for detention authorising and directing him upon payment of all costs charges and expenses attending the custody of the ship to release it forthwith.
Notice of application to agent or solicitor of owner	(9) (a) With respect to notice of application for an order for detention and to undertakings to give security the following provisions shall have effect: (b) Notwithstanding anything in this rule contained a person intending to apply for an order for detention shall if the name and address of an agent in England for the owners of the ship or of a solicitor in England authorised to act for the owners agent master or consignee of the ship are known to him give to such agent or solicitor by post telegram or otherwise such notice of the time and place at which the application for an order for detention is intended to be made as may be practicable in the circumstances of the case.
Undertaking by solicitor Form 34	(i) If a solicitor in England represents that he is authorised to act for the owners agent master or consignee of the ship and signs an undertaking according to the form in the Appendix to put in or give security for an amount agreed on between the parties or fixed by the judge then on such undertaking being filed in court: (ii) the judge may in his discretion refuse to make an order for detention or (iii) if an order for detention has been made but not executed the judge may rescind it or (iv) if an order for detention has been made and executed the judge may deliver to the party applying for the same an order of release in accordance with paragraph 8 of this rule.
Filing of undertaking	(d) An undertaking given in accordance with the last preceding paragraph shall be filed in the court to which the application for an order for detention is made or is intended to be made.
Attachment for non-compliance with undertaking.	(e) A solicitor who fails to put in or give security in pursuance of his undertaking to do so shall be liable to attachment.

(10) Where proceedings by way of arbitration for the recovery of compensation are taken against the persons giving security, the request for arbitration and particulars shall state concisely the circumstances under which the persons giving security are made respondents.

Particulars to state circumstances under which persons giving security are made respondents. Form 8.

(11) Where proceedings are commenced in any court in England, Scotland or Ireland other than in which the order for detention was made or applied for, the registrar of the court in which the order was made or applied for shall on request transmit by registered post to the registrar of the court in which the proceedings are commenced all original documents filed in the matter and a certified copy of all records made with reference to the matter and any bond by way of security given in the matter and shall transfer to such last mentioned court any money paid into court by way of security in the matter and the provisions of Order VIII. Rule 9 as to the costs of copies and the cost of transmission shall apply to any transmission under this paragraph.

Transmission of documents etc. where proceedings commenced in court other than that in which order for detention made or applied for.

(12) The cost incurred by any party in relation to an application for an order for detention and any proceedings consequent thereon may in any subsequent proceedings by way of arbitration be allowed as costs of the arbitration.

Application for order for detention.

Proceedings taken by Employer who has paid Compensation on account of Compensation claimed against him to obtain Order for Detention of Ship. (Form VII c. 10)

38. Where an employer who has paid compensation on account of compensation claimed against him desires to make an application for the detention of a ship under the Ship-owners' Negligence (Remedies) Act, 1905, the provisions of the last preceding rule shall apply subject to the rule for the time being in force under the last mentioned Act and to the following modifications viz.

Application by employer for detention of ship. S.O. VII c. 10.

- (i) An application for an order for detention in order for Terms 31, 32, 33 detention and a bond given by way of security shall be according to the terms in the Appendix.
- (ii) Where proceedings by way of arbitration for the recovery of compensation are taken against the Employer he may bring in the persons giving security as third parties in accordance with Rule 21 and the provisions of that rule shall apply accordingly.

- (iii) Where such proceedings are taken against the employer in any court other than that in which the order for detention was made or applied for, and the employer brings in the persons giving security as third parties, the provisions of paragraphs 11 and 12 of the last preceding rule shall apply.
- (iv) Where the employer has paid compensation in respect of the injury, all questions as to his right to indemnity against the persons giving security, and as to the amount of such indemnity, shall in default of agreement be settled by action, or by consent of the parties, by arbitration in accordance with the Act and these Rules; and if such questions are settled by arbitration, the provisions of paragraphs 10 to 12 of the last preceding rule shall apply.

Index of Provisions

Application of
Act and Rules
to cases of
industrial
diseases

39 (1) In the application of the Act and these Rules in the case of a workman disabled by or suspended on account of his having contracted any disease mentioned in section 8 of and the third schedule to the Act or whose death has been caused by any such disease, the following provisions shall have effect:

Notice of
disablement

12 The notice required by section 2 of the Act shall state the date and cause of the disablement or suspension, and where a certificate of disablement or a certificate of or relating to suspension has been given a copy thereof shall on demand be furnished to the employer.

Forms of
request for
arbitration

13 A request for arbitration shall be according to such one of the forms in the Appendix as shall be applicable to the case with such modifications as the nature of the case may require.

Adding
respondent
under Act, s. 8
(1) (c) (ii)
Forms 10, 20

(1) (c) If the employer desires to add any other employer as a party to the arbitration, pursuant to proviso (ii) to paragraph (1) of sub-section (1) of section 8 of the Act, he shall file with the registrar in duplicate a notice according to the form in the Appendix, and thereupon the registrar shall make an order adding such other employer as a respondent, and may if necessary adjourn the hearing of the arbitration for such time as may be necessary to enable such other employer to be duly served.

Notice of
order, and
service on added
respondent.

(b) Where a respondent is added under the last provision an order, copy of the notice, pursuant to which he is so added, and the original of the order shall be sent by post to the applicant and the original of the order and the like copies, together with a copy of the ap-

request and particulars and of the notice served on the original respondent under Rules 14 and 15, and a notice according to the form in the Forms 21, 22 Appendix as to the place at which and the day and hour on and at which the arbitration will be proceeded with shall be issued by the registrar for service on the added respondent and such copies and notices shall be served on the added respondent in accordance with Rule 15 with the substitution of the original respondent for the applicant.

(c) The provisions of these Rules as to respondents shall apply to the added respondent from the date of service on him as if he had been originally made a respondent.

(d) At the hearing of the arbitration the judge or arbitrator shall decide all questions as between the applicant and the original and added respondent and may make such award as may be necessary effectively and completely to adjudicate upon and settle all the questions involved in the arbitration and may make such order as to costs as between the applicant and the respondents and as between the respondent themselves as may be just.

(e) When the employer claims under provision (c) of paragraph (c) of sub-section (1) of section 8 of the Act to be entitled to contribution from any other employer, he may bring in such other employer as a third party in accordance with Rules 19 to 23, 25 and 26, and the provision of these rules shall with the necessary modifications apply to any such claim for contribution in like manner as they apply to claims for indemnity.

Appointment of Arbitrator by Judge in case of Arbitration agreed to by the Parties under Schedule II—Paragraphs 8

40 (1) In case of the death or refusal or inability to act of an arbitrator agreed on by the parties, any party to the arbitration who desires to make an application to the judge to appoint a new arbitrator shall apply in writing to the registrar to fix a time and place for the hearing of such application.

(2) The registrar shall fix the hearing of the application before the judge for any court appointed to be held within fourteen days from date of the application to the registrar, but so that he shall not, except by consent, fix the hearing on a day less than seven days from date of the application.

(3) If there is no available court the registrar shall send notice of the intended application to the judge who shall as soon as conveniently may be fix a time and place for the hearing of the application.

Such time shall not, except by consent, be less than seven days from the date of the application to the registrar.

Summons to
other party
Form 35

(4) On the time and place for the hearing of the application being fixed, the registrar shall issue to the applicant a summons under the seal of the court according to the form in the Appendix addressed to the other party to the arbitration, and require him to attend on the hearing of the application.

Service of
summons

(5) Such summons shall be served by the applicant on the other party in accordance with Rule 15 of these Rules not less than four clear days before the day fixed for the hearing, unless such party agrees to accept shorter service.

Hearing of
application

(6) On the day fixed for the hearing the judge shall dispose of the application on hearing the parties or on hearing the applicant and on proof of service of the summons on the other party, if such other party does not appear.

Appointment
of witnesses
to act

(7) Before appointing any person to act as arbitrator the judge shall ascertain that such person is willing to give if appointed.

Order

(8) The appointment may be made by endorsement on the summons or by a separate order.

Costs

(9) The costs of the application shall be in the discretion of the judge who may order the same to be paid by one party to the other or to be dealt with as costs attending the arbitration. Such costs if allowed shall be taxed on such scale as the judge shall direct.

Memorandum under Section 11, Part 1 of 1925

Memorandum
to be sent to
registrar
Act, Section 2,
para 9
Form 36

41. (1) The memorandum as to any matter decided by a committee or by an arbitrator or by agreement which is by paragraph 9 of the second schedule to the Act required to be sent to the registrar shall be intitled in the matter of the Act and shall be left at the office of the registrar or sent by post by registered letter addressed to the registrar at his office as soon as may be after the matter has been decided.

(2) When the matter is decided after a medical referee has been appointed to report on any matter under paragraph 15 of the second schedule to the Act a copy of the report of the referee shall be annexed to the memorandum and recorded therewith, and if the referee attended any proceedings in the arbitration, it shall be so stated in the memorandum.

42. If the matter is decided by a committee or an arbitrator the memorandum shall be authenticated by the signatures of the chairman and secretary of the committee or by the signature of the arbitrator and it shall be the duty of the committee or arbitrator as soon as may be after the decision to draw up such memorandum and to sign the same or cause it to be signed as aforesaid and to lay or send the same as aforesaid or to deliver the same to some party interested to be by him self or sent.

Authentication
of memorandum
of decision of
committee or
arbitrator

2. If the matter is decided by agreement the memorandum shall be authenticated by the signatures of all parties to such agreement, or by the signature of some or one of them or by the signatures or signature of the arbitrators to the parties or one or one of them or then or by itself.

Authentication
of memorandum
of agreement

3. There shall be left or sent with the memorandum a copy thereof for every party interested other than the party or parties by whom the memorandum is left or sent.

43. On the receipt of the memorandum the registrar shall send one of the copies thereof to every party interested with a notice according to the form in the Appendix requesting such party to inform him within seven days from the date of the notice whether he receives the memorandum as genuine or whether he disputes it and if so in what particulars or objects to its being recorded and if so on what ground.

Notice to
party in-
terested
to inform him
of memorandum
received
by him

44. If all the parties interested admit the genuineness of the memorandum or do not within such period of seven days dispute it or object to its being recorded the registrar shall subject to proviso (b) to paragraph 3 of the second schedule to the Act and to Rule 19, record it without further proof.

Recording of
memorandum,
if not disputed.

45. If any party interested disputes the genuineness of the memorandum or if where a workman seeks to record a memorandum of agreement between his employer and himself the employer alleges that the workman has not returned to work and is earning the same wages as he did before the accident and objects to the recording of the memorandum such party or employer shall within seven days from the date of the notice mentioned in Rule 43 file with the registrar a notice according to the form in the Appendix that he disputes the genuineness of the memorandum or that he objects to its being recorded and shall with such notice file a copy thereof for each of the other parties interested.

Where memo-
randum disputed,
or employer
objects to its
being recorded
Act, Section 2,
para 3 (b).

Form 38.

Notice of dispute or objection

Form 39

48 On the receipt of any such notice as in the last preceding rule mentioned the registrar shall send a copy thereof to each of the other parties interested together with a notice according to the form in the Appendix informing such party that the memorandum will not be recorded except with the consent in writing of the party or employer disputing the same or objecting to the same being recorded, or by order of the judge.

Subsequent proceedings

47 (1) If the consent mentioned in the last preceding rule is obtained the registrar shall subject to provisions of paragraph 9 of the second schedule to the Act and to Rule 19 record the memorandum without further proof.

(2) If such consent cannot be obtained any party interested may apply to the judge to order the memorandum to be recorded.

Provisions for Record of Memorandum of Rectification of Registry

Provisions applicable to application for record of memorandum or rectification of registry

Form 40

48 The following provisions shall apply to an application for an order that a memorandum be recorded or an application to the judge to rectify the register pursuant to paragraph 9 of the second schedule to the Act.

(a) The application shall be made in court on notice in writing, stating the relief or order which the applicant claims.

(b) The notice shall be filed with the registrar and copies thereof shall be served

(i) in the case of an application for an order that a memorandum be recorded on the party disputing the memorandum or objecting to its being recorded and on all other parties interested;

(ii) in the case of an application to rectify the register, on every party who would be affected by such rectification subject to the provisions of these Rules as to the parties to an arbitration;

or on the solicitor of such party ten clear days at least before the hearing of the application, unless the judge or registrar gives leave for a shorter notice.

(c) On the hearing of the application witnesses may be orally examined in the same manner as on the hearing of an action.

- (d) On the hearing of the application the judge may make such order or give such direction as he may think just regard being had, in the case of an application for an order that a memorandum of an agreement be recorded, to proviso (d) to paragraph 9 of the second schedule to the Act.
- (e) The provisions of the Act and these Rules as to the costs of an arbitration before the judge shall apply to any such application.

Recording of Agreement presented by Registration to the Judge.
Schedule II Paragraph 9 Proviso (d)

40 (1) Where a memorandum of an agreement presented for proceedings where agreement presented for registration relates to any matter referred to in proviso (d) to paragraph 9 of the second schedule to the Act the registrar may before recording the same, make such inquiries and obtain such information as he may think necessary in order to satisfy himself whether the memorandum may properly be recorded to said being had to the said proviso (d)

(2) Where it appears to the registrar that the memorandum ought not to be recorded for any reason mentioned in the said proviso, he shall make a report to the judge in writing stating the information he has obtained and the grounds on which it appears to him that the memorandum ought not to be recorded.

(3) If on consideration of the registrar's report it appears to the judge that the memorandum may properly be recorded he may so direct and it shall be recorded accordingly.

(4) If on consideration of the registrar's report it appears to the judge that the memorandum should not be recorded without further inquiry the registrar shall send notice to the parties to the agreement according to the form in the Appendix, informing them that he has referred the matter to the judge and requiring them to attend on a day to be named in the notice when the matter will be inquired into by the judge. Form 41.

(5) The notices shall be sent to the parties or their solicitors ten clear days at least before the day fixed for the inquiry, unless the judge directs shorter notice to be given.

(6) At the inquiry witnesses may be orally examined in the same manner as on the hearing of an action.

(7) At the inquiry the judge may make such order or give such directions as he may think just.

(8) The provisions of the Act and these Rules as to the costs of an arbitration before the judge shall apply to any such inquiry.

*Proceedings for Removal of Record of Memorandum of Agreement
from Register under Schedule II Paragraph 9 (Part 5a)*

Application for
removal of
agreement from
register
Act, Sched. 2,
par. 9,
proviso (c)
Form 12

50 (1) An application to the judge by or on behalf of any party for the removal from the register of the record of a memorandum of an agreement under proviso (c) to paragraph 9 of the second schedule to the Act shall be made in court on notice in writing, and the provisions of Rule 18 shall apply to the proceedings on such application.

Notice where
inquiry directed
by judge
Form 13

(2) If it appears to the judge on a report by the registrar without such application as in the last preceding paragraph mentioned that the record of a memorandum of an agreement should be removed from the register pursuant to the said proviso the registrar shall send notice to the parties to the agreement according to the form in the Appendix, requiring them to attend on a day to be named in the notice when the matter will be inquired into by the judge.

(3) Such notice shall be sent and the inquiry held in accordance with the provisions of the last preceding rule and the provisions of that rule shall apply to any such inquiry.

Certificate under Section 1 Sub-section 1

4

Certificate under
Act, sec. 1,
sub-sec. 1
Form 44

51 (1) Where an action is brought in the County Court to recover damages independently of the Act for injury caused by any accident and the court proceeds under sub-section 1 of section 1 of the Act the certificate given by the court shall be according to the form in the Appendix.

(2) The registrar shall on receiving a certificate given by any other court under the said sub-section record the same in like manner as if such certificate were awarded made by the judge.

*Summoning Medical Reference Assessor under Schedule II,
Paragraph 5*

Application for
assessor
Act, Sched. 2,
par. 5
Form 45

52 (1) Any party to an arbitration may eight clear days at least before the day fixed for proceeding with the arbitration file with the registrar an application according to the form in the Appendix, requesting the judge to summon a medical referee to sit with him as an assessor under paragraph 5 of the second schedule to the Act.

Assessor to be
summoned if
judge approves

(2) On the receipt of an application for an assessor the registrar shall forward a copy of the same to the judge who if he thinks fit shall return the same with his approval, and thereupon the registrar shall forthwith summon an assessor.

(3) If the judge does not think fit that an assessor shall be summoned, notice thereof shall be given by the registrar to the applicant according to the form in the Appendix.

(4) If the judge thinks fit either on the application of any party to an arbitration or on his own motion to summon a medical referee to sit with him as an assessor, the registrar shall be bound to summon one of the medical referees appointed by the Secretary of State for the area comprising the district of the court in which the arbitration is pending, by sending to such medical referee by post a summons to do so according to the form in the Appendix.

(5) If at the time and place appointed for the arbitration the medical referee summoned does not attend, the judge may either proceed with the arbitration without the assistance of an assessor or he may adjourn the hearing.

Application to Medical Referee to Report on Case, Schedule II
Paragraph 1.

53. (1) Subject to and in accordance with regulations made by the Secretary of State and the Treasury under paragraph 1 of the second schedule to the Act the judge may submit to a medical referee for report any matter which seems material to any question arising in an arbitration.

(2) When any matter is submitted as aforesaid the judge may, subject to and in accordance with such regulations, order the injured workman to submit himself for examination to the medical referee, and it shall be the duty of the workman on being served with such order to submit himself for examination accordingly.

Application to Referee to Medical Referee, Schedule I
Paragraph 15.

54. (1) With respect to applications to the registrar pursuant to paragraph 15 of the first schedule to the Act to refer any matter to a medical referee, the following provisions shall have effect:

(2) An application to the registrar to refer any matter to a medical referee shall be made in writing, and shall contain a statement of the facts which render the application necessary, according to the form in the Appendix, and shall be accompanied by a copy of the report of every medical practitioner who has examined the workman either on behalf of the employer or on the selection of the workman. The application shall be signed by or on behalf of both

parties, and the applicant shall file copies of the application and reports for the use of the medical referee.

Form 14 (1) On the hearing of the application the registrar shall refer the matter to one of the medical referees appointed for the area comprising the district of the court, and shall forward to such medical referee by registered post one of the filed copies of the application and reports with an order of reference according to the form in the Appendix.

Form 50 (1) The registrar shall also make an order directing the workman to submit himself for examination by the medical referee subject to and in accordance with any regulations made by the Secretary of State.

(2) Before making such order the registrar shall inquire whether the workman is in a fit condition to travel for the purpose of examination, and if satisfied that he is in a fit condition shall by the order direct him to attend at such time and place as the referee may fix, and if satisfied that he is not in a fit condition to travel shall so state in the order of reference, and it shall be the duty of the workman, on being served with the order, to submit himself for examination accordingly.

(3) The registrar shall deliver or send by registered post to each party a copy of the order of reference and shall send to the workman a copy of the order directing him to submit himself for examination.

(4) The medical referee shall forward his certificate in the matter to the registrar by registered post.

Form 51 (5) On the receipt of the certificate of the medical referee the registrar shall inform the parties by post that it has been received, and shall permit any party to inspect the same during office hours, and shall on the application and at the cost of either party furnish him with a copy of the certificate or allow him to take a copy thereof.

(6) The fee payable by the applicant shall be calculated at the rate of one shilling in the pound on 20 times the amount of the weekly payments claimed by or payable to the workman so that the total fee shall not exceed 20 pounds.

(7) The costs of any application to the registrar, including the fee paid under the last preceding paragraph, may be allowed as costs in any subsequent arbitration for the settlement of the weekly payment to be made to the workman, or, where the application is made after the weekly payment has been settled, as costs in any subsequent arbitration as to the review of such weekly payment.

Suspension of Proceeding for Weekly Payments on Refusal to Submit to Examination under Schedule I Paragraph 1 Paragraph 11 or Paragraph 14

55 (1) In any case in which a workman has given notice of an accident or is receiving weekly payments under the Act and the employer alleges that the workman refuses to submit himself to medical examination in accordance with paragraph 1st paragraph 11th or paragraph 14th of the first schedule to the Act or in any way obstructs such examination the employer may apply for a suspension of the right to compensation and to take or prosecute any proceedings under the Act in relation to compensation or of the right to the weekly payments until such examination has taken place in accordance with this rule.

(2) Where proceedings are pending before a committee or an arbitrator agreed on by the parties the application shall be made to such committee or arbitrator.

(3) Where the workman has given notice of an accident but no proceedings are pending or proceedings are pending before the judge or an arbitrator appointed by him the application shall be made to the judge.

(4) Where the workman is receiving weekly payments under an order memorandum or certificate then—

(a) If proceedings for the review of the weekly payment are pending before a committee or an arbitrator agreed on by the parties the application shall be made to such committee or arbitrator.

(b) If no proceedings for review are pending or if proceedings for review are pending before the judge or an arbitrator appointed by him the application shall be made to the judge.

(5) Where the application is to be made to the judge it may be made in or out of court in accordance with Rule 18 and the provisions of the said rule shall apply to the proceedings on such application with the following modification—

(a) The notice shall be served on the workman or his solicitor five clear days before the hearing of the application unless the judge or registrar gives leave for shorter notice.

*Payment into Court and Investment and Application of Money
payable in case of Death. Schedule I, Paragraph 5.*

Payment into
court, invest-
ment, and
application of
money in case
of death. Act,
Sched. I, para. 5.

56. 1. Where any payment in the case of death is to be paid into the County Court pursuant to paragraph 5 of the first schedule to the Act, the following provisions shall have effect:

(2) Where any money is to be paid into court under an award made by the judge or an arbitrator appointed to him payment shall be made in accordance with the directions contained in the award.

(3) In any other case payment shall be made into the court in which the memorandum of the decision, award or agreement under which the money is to be paid or the certificate under which the money is to be paid has been or is to be recorded.

Form 53.

1. Where money is to be paid into court under the last preceding paragraph, the party paying the same shall lodge with the registrar a receipt in duplicate according to the form in the Appendix annexed to one copy of the prescribed form of receipt, and the registrar on the receipt of the sum paid in shall sign the receipt and return the same to the party making the payment, and the party making the payment shall forthwith give notice to the persons interested in the sum paid in of such payment having been made.

(4) If all questions as to who are dependants and the amount payable to each dependant have been settled by agreement or arbitration before payment into court, the sum paid into court shall be allotted between the dependants in accordance with the agreement or award, and the amount allotted to each dependant shall be invested, applied, or otherwise dealt with by the court for the benefit of the person entitled thereto in accordance with paragraph 5 of the first schedule to the Act.

(5) If such questions have not been settled before payment into court, then:

(a) If all the persons interested in the sum paid into court agree to leave the application thereof to the court, the amount paid into court shall on application by or on behalf of such persons, be invested, applied, or otherwise dealt with by the court for the benefit of the persons entitled thereto in accordance with paragraph 5 of the first schedule to the Act.

(b) If any question arises as to who is a dependant or as to the amount payable to any dependant or otherwise as to the application of the sum paid into court, such question shall be settled by the court by arbitration in accordance with these

rules, and the amount allotted to each dependant shall be invested, applied or otherwise dealt with by the court for the benefit of the person entitled thereto in accordance with paragraph 5 of the first schedule to the Act.

(7) Where any question is settled by the court by arbitration in accordance with the last preceding paragraph an application for the investment or application of any sum allotted to any person on such arbitration may be made at or immediately after the hearing of the arbitration.

(8) Where application is not so made, or in any other case coming within paragraph 5 of the first schedule to the Act, an application for the investment or application of the sum paid into court or the amount allotted to any person may be made without petition and the judge, on such evidence of title and identity as he may think necessary, may make such order under paragraph 5 of the first schedule of the Act and this rule as he may think fit.

(9) Every order for the investment or application of money paid into court shall reserve liberty to the parties interested to apply to the court as they may be advised.

(10) Where any sum allotted to any person under paragraph 5 of the first schedule to the Act or this rule is ordered to be paid out thereon applied for the benefit of the person entitled thereto by weekly or other periodical payments, such payments may be made to the person entitled to receive the same either at the office of the registrar, or on the written request of such person by crossed cheque or post office order addressed to such person and forwarded by registered post letter, payment by post being in all cases at the cost and risk of the person requesting the same.

Payment into Court and Application of Weekly Payment payable to Person entitled to such Payment by Schedule I, Paragraph 7.

57. (1) An application under paragraph 7 of the first schedule ^{Application for payment into court of} to the Act for an order that a weekly payment payable under the Act to a person under any legal disability shall during the disability ^{weekly payment to person under legal disability} be paid into court may be made either by the person liable to make ^{par 7} such payment or by or on behalf of the person entitled to such payment.

(2) If the weekly payment is awarded by the judge, the application may be made at or immediately after the hearing of the arbitration.

Form 54

(5) In any other case the application may be made in or out of court on notice in writing which shall be served on the other party or his solicitor five clear days at least before the hearing of the application unless the judge or registrar gives leave for shorter notice, and the provisions of Rule 18 shall apply to any such application.

(6) Where any weekly payment is ordered to be paid into court, the sums paid in shall be paid out by the registrar to or otherwise applied for the benefit of the person entitled thereto in such manner as the judge shall direct and the provisions of the last preceding rule as to the payment out on application of sums by weekly or other periodical payments shall apply.

Application for Variation of Order under Schedule 1 Paragraph 9

Application for
variation of
order
Act, Sched. 1,
para. 9
Form 55

58 (1) An application for the variation of an order of the court under paragraph 9 of the first schedule to the Act may be made by any person interested.

(2) The application shall be made in court on notice in writing stating the circumstances under which the application is made and the relief or order which the applicant claims.

(3) The notice shall be filed with the registrar and notice thereof shall be served on all persons interested in accordance with Rule 18, and the provisions of that rule and of Rule 50 shall apply to the proceedings on such application.

Investment and Application of Lump Sum paid in Lieu of Weekly Payment under Schedule 1 Paragraph 17

Investment and
application of
sums paid in
redemption of
weekly pay-
ments
Act, Sched. 1,
para. 17
Form 56

59 Where pursuant to paragraph 17 of the first schedule to the Act a lump sum payable for the redemption of any weekly payment is ordered by a committee or an arbitrator or by the judge to be invested or applied for the benefit of the person entitled thereto such sum shall be paid into court and the provisions of paragraph 7 of the first schedule to the Act and of Rule 50 shall apply to the investment and application of such lump sum.

Proceedings where Workman receiving Weekly Payment intends to cease to reside in United Kingdom under Schedule 1 Paragraph 18

Where workman
receiving
weekly pay-
ment intends

60 (1) Where a workman receiving a weekly payment intends to cease to reside in the United Kingdom, the following provisions shall have effect under paragraph 18 of the first schedule to the Act:

(2) The workman may apply to the registrar to refer to a medical referee the question whether the incapacity of the workman resulting from the injury is likely to be of a permanent nature.

Forms to
be filed in
United
Kingdom
Act Sched. 1,
part 1st

(3) The application shall be made on notice in writing according to the form in the Appendix which shall be filed with the registrar, Form 56 and shall be accompanied by a copy of the report of any medical practitioner who has examined the workman on the selection of the workman, and a copy of the application and of such report (if any) shall be served on the employer or his solicitor in accordance with Rule 18, and the applicant shall file a copy of the application and of the report (if any) for the use of the medical referee.

(4) If the workman has been examined by a medical practitioner on behalf of the employer, the employer may at or at any time before the hearing of the application furnish the workman with a copy of the report of that practitioner as to the workman's condition, and file a copy of the report for the use of the medical referee.

(5) On the hearing of the application the registrar, on being satisfied that the applicant has a bona fide intention of ceasing to reside in the United Kingdom, shall make an order referring the question to a medical referee, and if he is not so satisfied, he may refuse to make an order, but in that case he shall if so requested by the applicant refer the matter to the judge, who may make such order or give such directions as he may think fit.

(6) If the registrar or the judge makes an order referring the question to a medical referee, he shall also make an order directing the workman to submit himself for examination by the medical referee, subject to and in accordance with any regulation made by the Secretary of State, and the provision of paragraph 3 (c) of Rule 51 shall with the necessary modifications apply.

Form 56

(7) The medical referee shall forward his certificate in the matter to the registrar by registered post specifying therein the nature of the incapacity of the workman and whether the same is total or partial, and the registrar shall thereupon proceed in accordance with paragraph 8 of Rule 51.

Form 51.

(8) Where the medical referee certifies that the incapacity resulting from the injury is likely to be of a permanent nature, the registrar shall on application furnish the workman

(a) with a copy of the certificate of the medical referee, sealed with the seal of the court and certified by the registrar in his own handwriting to be a true copy, and

- (d) with a copy of the award memorandum or certificate under which the weekly payment is payable sealed with the seal of the court and certified by the registrar in his own handwriting to be a true copy; and
- Form 59. (e) with a certificate of identity according to the form in the Appendix; and
- Forms 59, 60, 61. (f) with a notice according to the form in the Appendix annexing thereto forms of certificate and declaration according to the forms in the Appendix;
- and shall procure from the workman a specimen of his signature and file the same for reference.
- (9) A workman who desires to have the weekly payments payable to him remitted to him while residing out of the United Kingdom shall at intervals of three months from the date to which such payments were last made submit himself to examination by a medical practitioner in the place where he is residing and shall produce to him the copy of the certificate of the medical referee and the certificate of identity furnished under the last preceding paragraph and shall obtain from him a certificate in the form in the Appendix that the incapacity of the workman resulting from the injury continues; and such certificate shall be verified by declaration by the medical practitioner in the presence of the workman before a person having authority to administer an oath.
- Form 61. (10) The workman shall also make a declaration of identity according to the form in the Appendix before a person having authority to administer an oath producing to such person the copy and certificate above mentioned and the certificate of the medical practitioner by whom he has been examined.
- Form 62. (11) The workman shall forward the certificate and declaration in the two last preceding paragraphs mentioned to the registrar with a request according to the form in the Appendix for the transmission to him of the amount of the weekly payments due to him specifying the place where and the manner in which the amount is to be remitted which request shall be signed by the workman in his own handwriting.
- (12) On receipt of the certificate, declaration and request the registrar shall examine the same and may if not satisfied that the same are in order return the same for correction.
- (13) If the registrar is satisfied that the certificate, declaration, and request are in order or when they are returned to him in order,

he shall send to the employer a notice according to the form in the Appendix requesting him to forward the amount due, and the employer shall thereupon forward the amount to the registrar who shall remit the same less any fees payable to the registrar and the costs of transmission to the workman at the address and in the manner requested by him such remittance being in all cases at the cost and risk of the workman.

COSTS.

61. (1) Any costs of and incident to an arbitration and proceedings connected therewith directed by a committee or by an arbitrator (whether arrived on by the parties or appointed by the judge) or by the judge to be paid by one party to another shall in default of agreement between the parties as to the amount of such costs be taxed according to each one of the scales of costs applicable to actions in the County Court. The committee, arbitrator or judge shall direct, and in default of such direction shall be taxed according to the scale which would be applicable if the proceedings had been an action in the County Court, and the taxation provisions and rules for the time being in force in both as to the allowance and taxation of costs in such actions, and as to objections and review of taxation by the registrar shall apply accordingly. Proceedings in an arbitration shall be within Order 14, 1911. Rules 7 and 8, and the word "judge" in those rules shall include a committee and an arbitrator. costs
Act, Sched. 2,
p. 7

(2) Where the subject-matter of an arbitration is not a capital sum the committee, arbitrator or judge shall determine what for the purpose of the allowance and taxation of costs shall be considered to be the amount of the subject-matter of the arbitration, and in default of such determination the amount shall be paid by the registrar by whom the costs are to be taxed, subject to review by the judge.

(3) The committee, arbitrator or judge in dealing with the question of costs may take into consideration any offer of compensation proved to have been made on behalf of the employer.

(4) Where any workman is examined by a medical referee on a reference under paragraph 15 of the first schedule to the Act and the certificate of the referee is used in any subsequent arbitration any reasonable travelling and other expenses incurred by the workman in obtaining such certificate (if not otherwise provided for) may by order of the committee, arbitrator or judge be allowed as costs in the arbitration.

(5) Where a workman is ordered to submit himself for examination by a medical referee appointed to report under paragraph 15 of the

second schedule to the Act, any reasonable expenses incurred by such workman in travelling to attend on such referee for examination may, by order of the committee, arbitrator or judge be allowed as costs in the arbitration.

Taxation of
costs awarded
by committee
or arbitrator
agreed on by
parties

62 Where any costs are awarded by a committee or an arbitrator agreed on by the parties it shall be the duty of the registrar of the court in which a memorandum of the decision of the committee or arbitrator is recorded pursuant to paragraph 9 of the second schedule to the Act on application made to him to tax such costs and to enter in the register the amount of such costs allowed on taxation and such entry shall be deemed to be part of such memorandum and shall be enforceable accordingly.

Review of Costs by Judge

Review of
taxation

63 (1) An application to the judge to review any taxation of costs shall be made on notice in writing which shall be served on the opposite party twelve days at least before the hearing of the application unless the judge or registrar give leave for shorter notice.

(2) Such application shall be heard and determined upon the evidence which has been brought in before the registrar and no further evidence shall be received on the hearing thereof unless the judge otherwise directs.

(3) The costs of and incident to the application shall be in the discretion of the judge.

(4) The result of such review shall be entered in the register.

As to authority
of solicitor to
receive costs
payable by
adverse party

64 Where any party to whom costs are awarded acts by a solicitor, such solicitor shall have the same authority to take out of court or receive any sum paid into court or payable in respect of such cost by the party against whom such costs are awarded as he would have if such costs were awarded in an action.

Costs of Solicitor in Appeal under Schedule II Paragraph 11.

Application to
defence costs
payable to
solicitor or
agent
Act, Sched. 2,
par. 14.

65 (1) The following provisions shall apply to an application under paragraph 11 of the second schedule to the Act for the determination of the amount of costs to be paid to the solicitor or agent of a person claiming compensation under the Act.

(2) Where the sum awarded as compensation has been awarded by a committee or an arbitrator agreed on by the parties the application shall be made to such committee or arbitrator.

(3) Where the sum awarded as compensation has been awarded by the judge or by an arbitrator appointed by him the application may be made—

- (a) to the judge or arbitrator at or immediately after the hearing of the arbitration; or
- (b) at a subsequent date, but in that case it shall be made only to the judge.

(4) Where a sum has been agreed on as compensation the application shall be made to the judge.

(5) An application made to the judge other than in application under paragraph 1(c) of this rule, shall be made in court on notice in Form 66, written in accordance with Rule 48.

(6) Such notice shall be served on the person for whom the solicitor or agent acted in accordance with the said rule, and the provisions of the said rule shall apply to the proceedings on such application.

(7) On the hearing of any application under this rule the committee, arbitrator or judge may award costs to the solicitor or agent, and may make an order directing such solicitor or agent to be entitled to recover such costs from the person for whom he acted or to be entitled to a lien for such costs on any sum awarded as compensation to such person or to be entitled to deduct such costs from any such sum or may make such order or give such directions as may be just.

(8) Any costs awarded to a solicitor or agent on any such application shall in default of agreement between the parties as to the amount of such costs be taxed according to such one of the scales of costs applicable to actions in the County Court as the committee, arbitrator or judge shall direct, and in default of such direction such costs shall be taxed according to the scale which would be applicable if the proceeding had been an action in the County Court, and the statutory provisions and rules for the time being in force as to the allowance and taxation of costs in such actions, and as to objections and review of taxation by the registrar shall apply accordingly, and any taxation shall be subject to review by the judge according to Rule 61.

(9) Where the subject-matter of the arbitration is not a capital sum, the committee, arbitrator or judge shall determine what, for the purpose of the allowance and taxation of such costs shall be considered to be the amount of the subject-matter of the arbitration, and in default of such determination the amount shall be fixed by the registrar, by whom the costs are to be taxed, subject to review by the judge.

Provisions as
to order
deciding
how, etc

68 Where an order is made by a committee, arbitrator, or judge awarding costs to a solicitor or agent and declining such solicitor or agent to be entitled to recover such costs from the person for whom he acted or to be entitled to a lien for such costs on any sum awarded or agreed as compensation or to be entitled to deduct such costs from any such sum, the following provisions shall apply:

- (a) The registrar shall, on application made to him, tax such costs;
- (b) A copy of the order and when the amount to which such solicitor or agent is entitled has been ascertained by taxation a memorandum of such amount shall at the request and cost of the solicitor or agent be issued by the registrar for service on the party liable to pay the sum awarded or agreed as compensation, and service thereof may be effected on such party in accordance with Rule 15;
- (c) A memorandum of such order and when such amount has been ascertained a memorandum of such amount shall be recorded in the register in which the memorandum or award under which the sum awarded as compensation is payable is recorded, and such last mentioned memorandum or award shall have effect subject to such order and memorandum;
- (d) The party liable to pay such compensation shall on demand pay to the solicitor or agent the amount to which he is entitled but so that such party shall not be liable to pay any amount in excess of that which he is liable to pay for compensation or to pay such amount by any other means than those by which he is liable to pay such compensation;
- (e) If the party liable to pay such compensation fails on demand to pay any amount which he is liable to pay to such solicitor or agent the judge may on application made to him order notice to such party in accordance with Rule 18, and on proof of the order having been served on and demand for payment made to such party order such party to pay such sum and in default of payment the judge may order execution to issue to levy such amount;
- (f) Payment made by or execution levied on the party liable to pay such compensation shall be a valid discharge to him as against the party entitled to such compensation to the amount paid or levied;
- (g) Where the sum awarded as compensation has been paid into court, the amount to which the solicitor or agent is entitled shall be paid to him out of such sum.

Execution

87 (1) When a party liable to pay compensation or costs under Section any award memorandum or certificate has made default in payment of the amount awarded or where payment is to be made by instalments of any instalment execution may issue against his goods without leave for the amount in payment of which he has made default.

(2) Where such sum is not payable into court the party applying for execution shall satisfy the court by affidavit or otherwise as to the amount in payment of which default has been made.

(3) Where the parties liable to pay compensation or costs under any award memorandum or certificate are a firm the provisions of Order XXX. Rule 11 shall with the necessary modifications apply to execution under this rule.

Proceedings under Debtors Act 1869 Section 5

88 (1) Where proceedings by way of judgment summons under Proceedings section of the Debtors Act 1869 are taken against a party liable to pay compensation or costs under any award memorandum or certificate who has made default in payment of the amount awarded, or, where payment is to be made by instalments of any instalment the County Court Rules for the time being in force as to the committal of judgment debtors shall with any necessary modifications apply to such proceedings. Provided that the court shall not alter the terms or mode of payment of any sum to become payable in future under any award memorandum or certificate otherwise than by consent or under paragraph (b) of the last schedule to the Act.

(2) Where the amount in payment of which default has been made is not payable into court the party applying for a judgment summons shall satisfy the court by affidavit or otherwise as to the amount in payment of which default has been made.

(3) A judgment summons issued under this rule shall be according to the form in the Appendix.

(4) Where the parties liable to pay compensation or costs are a firm the provisions of the County Court Rules as to judgment summonses on a judgment or order against a firm shall with the necessary modifications apply to proceedings by way of judgment summons under this rule.

Other Proceedings for Enforcement of Award Memorandum, or Certificate

Other proceedings for enforcement of award, etc.

60 The County Court Rules for the time being in force as to proceedings for the enforcement of or the recovery of money due under judgments or orders of the County Court otherwise than by execution or committal shall, with the necessary modifications, apply to proceedings for the enforcement of or the recovery of money due under any award memorandum or certificate.

Set aside or varied or otherwise impeached

Rules as to new trials not to apply

70 (1) Notwithstanding anything in these Rules contained, the statutory provisions and rules relating to new trials in actions in the County Court shall not apply to arbitrations under the Act.

When award or order may be set aside or varied

(2) Where the judge is satisfied

(a) that any award or any order as to the application of any amount awarded or agreed upon as compensation made by the judge or by an arbitrator appointed by him has been obtained by fraud or other improper means; or

b that any person has been included in any award or order as a dependant who is not in fact a dependant as defined by the Act; or

(c) that any person who is in fact a dependant as defined by the Act has been omitted from any award or order

the judge may set aside or vary the award or order and may make such order (including an order as to any sum already paid under the award or order) as under the circumstances he may think just.

(3) An application to set aside or vary an award or order under this rule shall be made in court on notice in writing and the provisions of Rule 18 shall apply to the proceedings on such application.

4. An application to set aside or vary an award or order under this rule shall not be made after the expiration of six months from the date of the award or order except by leave of the judge and such leave shall not be granted unless the judge is satisfied that the failure to make the application within such period was occasioned by mistake, absence from the United Kingdom or other reasonable cause.

Appeals

Appeals Act, Sched 2, par 4

71 Appeals under paragraph 1 of the second schedule to the Act shall be had in accordance with the provisions of the Rules of the Supreme Court relating thereto.

72 (1) When the Court of Appeal has given judgment on any appeal, any party may deposit the order of the Court of Appeal, or an office copy thereof with the registrar, and the registrar shall file such order or copy and shall transmit a copy thereof to the judge, and such order shall have the same effect as if it had been a decision of the judge.

(2) If such order has the effect of an award, decision or order in the matter in favour of any party, such order shall be served and recorded and may be proceeded on in the same manner as if it had been an award, decision or order of the judge.

(3) If such order has the effect that an award be made or a decision given or order made in favour of any party, the judge shall make such award or give such decision or make such order accordingly.

(4) If such order directs or involves a re-hearing or further hearing of an arbitration or special case or other matter, the judge shall as soon as conveniently may be appoint a day and hour for such re-hearing or further hearing, and shall instruct the registrar to give notice thereof forthwith to the parties.

(5) Generally the judge shall make such award or give such decision or make such order and give such directions and take or direct to be taken such proceedings in the matter as may be necessary to give effect to the order of the Court of Appeal.

In what Court Proceedings may be taken

73 (1) Any matter which under the Act or these rules is to be done in a county court or by or before the judge or registrar of a county court shall be done in the county court or by or before the judge or registrar of the county court.

(a) of the district in which all the parties concerned reside; or

(b) if the parties concerned reside in different districts

(a) of the district in which the accident out of which the matter arose occurred; or

(b) in the case of any such workman as to paragraph 1 of Rule 39 mentioned of the district in which the workman was last employed in the employment to the nature of which the disease was due; or

(1) if the accident out of which the matter arose occurred at sea

(1a) of the district in which the ship shall be when the matter is to be done; or

(1b) of the district comprising the port of registry of the ship; or

(1c) of the district in which the workman or the dependants of the workman by whom or on whose behalf the matter is to be done or some or one of them resides or reside,

without prejudice to any transfer in manner provided by these Rules.

Detention of
ships

5 Edw. VII c. 10
Act, sec. 11

(2) An application for an order for the detention of a ship may be subject to the provisions of the rules for the time being in force under the Shipowners' Negligence Remedies Act 1905 or section 11 of the Act and Rules 37 and 38 such proceedings may be commenced

Proceedings
against persons
giving security,
5 Edw. VII c. 10
Act, sec. 11

(3) Where proceedings by way of attachment for the recovery of compensation are taken against the persons giving security pursuant to the Shipowners' Negligence Remedies Act 1905 or section 11 of the Act and Rules 37 and 38 such proceedings may be commenced

(a) in the county court of the district in which all the parties concerned reside; or

(b) if the parties concerned reside in different districts

(a) in the county court of the district in which the accident occurred; or

(b) if the accident occurred at sea

(1) in the county court of the district in which the vessel is or was detained; or in which the order for detention was made or applied for; or

(2) in the county court of the district in which the workman or the dependants of the workman or some or one of them resides or reside

without prejudice to any transfer in manner provided by these Rules.

Proceedings in one Court to subject-matter of Award Memorandum in Court made provided a another Court

Filing of certified copy of memorandum, etc., recorded in one Court under Act, section 2, par. 9, before taking subsequent proceedings in another Court

74 Where an award or a memorandum under paragraph 9 of the second schedule to the Act, or a certificate under subsection 1 of section 1 of the Act has been recorded in any court and any party desires to take any subsequent proceedings with reference to the subject-matter of such award memorandum or certificate in any other court, he shall before taking such proceedings obtain from

the registrar of the first-mentioned court a certified copy of such award, memorandum or certificate and shall file the same in the court in which he desires to take proceedings and the registrar of such last-mentioned court shall record the same as if it had been an award made in the court.

Transfer of Proceedings.

75 If the judge is satisfied by any party to any matter under the Transfer Act pending in his court that such matter can be more conveniently proceeded with in any other court in England, Scotland or Ireland, he may order such matter to be transferred to such other court, and thereupon the registrar shall forthwith transmit by registered post to the registrar of the court to which such matter is transferred all original documents filed in such matter, and a certified copy of all records made with reference to such matter, and shall transfer to such last-mentioned court any money invested in his name as registrar, and thenceforth such matter shall be proceeded with in the court to which it is transferred in the same manner as if it had originally been commenced therein. The provisions of Order VIII, Rule 9 shall apply to any such transfer or application for a transfer.

Order VIII,
Rule 9

Transfer of Money paid into Court.

76 (1) The provisions of the last preceding rule shall apply to the transfer of money paid into court from one court to another pursuant to paragraph 6 of the first schedule to the Act or otherwise, and to proceedings with respect to the application of such money.

Transfer of
money paid
into court
Act, Sched. 1,
para. 6.

(2) Where any money ordered to be transferred from one court to another is invested in the Post Office Savings Bank in the name of the registrar, such money shall be transferred into the name of the registrar of the court to which the money is ordered to be transferred in accordance with regulations to be made by the Postmaster-General with the consent of the Treasury; and where any money ordered to be transferred is not so invested it shall forthwith be so invested, and shall when invested be transferred in accordance with this rule.

Filing and Service of Documents, and Notices.

77 (1) Where any document is to be filed with the registrar under these Rules, that document may be filed by delivering it at the office of the registrar, or by sending it by post addressed to the registrar at his office.

(2) Where any document is to be so filed, there shall be filed with the original document as many copies of the document as there are

B.E.L.

3 D.

persons to whom copies of the document or any part thereof are to be sent by the registrar and in addition a copy for the use of the judge or arbitrator.

(3) Where any document is under these Rules to be sent to any person by the registrar that document may be sent by post.

(4) Any proceeding document or notice which is under these Rules to be served on any party may be served on such party by the opposite party or his solicitor, and where no special provision as to the mode of service is made by these Rules any such proceeding document, or notice may be served on such party or where he acts by a solicitor on his solicitor in manner provided by subsections 1 and 4 of section 2 of the Act with reference to service of notice in respect of an inquiry, and the provisions of Order LV, Rule 2 shall apply to the service of any such proceeding document or notice.

Act, sec. 2,
sub-sec. 3, 4
Order LV,
Rule 2.

Procedure Generally

Provisions as to
parties acting
by solicitors,
and as to sub-
stituted service
and notice in
lieu of service.
Order XVIII,
Rule 1, Order
LV, Rules 1,
3 to 6, Order
VII, Rule 10
Proceedings
where Crown
a party

78 The provisions of Order XVIII, Rule 1; Order LV, Rules 1 and 3 to 6 and Order VII, Rule 10 as to parties acting by solicitors and as to substituted service and notice in lieu of service shall apply to proceedings under the Act.

79 (1) In any proceedings under the Act or these Rules arising out of an inquiry to a workman employed by or under the Crown in which, if the employer were a private person such employer would be a necessary party, the head of the department by or under which the workman was employed or where the department is administered by a Board or by Commissioners such Board or Commissioners shall be made a party under his or their official title as representing the Crown.

Service of
documents, etc.

(2) In any such case any proceeding document, or notice to be served on the head of the department, or on the Board or Commissioners may be served on the permanent secretary to the department, subject to the provisions of these rules as to service on parties acting by solicitors.

Procedure,
where not
otherwise
provided for

80 Where any matter or thing is not specially provided for under these Rules, the same procedure shall be followed and the same provisions shall apply, as far as practicable as in a similar matter or thing under the County Courts Act 1888 and the rules made in pursuance of that Act.

Record of Proceedings—Special Register.

81. Proceedings under the Act before the judge or an arbitrator appointed by him shall be recorded in the books of the court in the manner in which other proceedings in the court are recorded, and the registrar shall also keep a special register for the purposes of the Act in which he shall record

Record of
proceedings
before judge
or arbitrator.
Special
Register.

- (1) A memorandum of every application made to the judge for the settlement of any matter by arbitration.
- (2) A memorandum of every appointment of an arbitrator to settle any such matter made by the judge.
- (3) A memorandum of every proceeding taken in any arbitration before the judge or an arbitrator appointed by him prior to the award.
- (4) A memorandum of every appointment of a medical referee by the judge or arbitrator and of his report and if a medical referee is summoned or requested to attend any proceeding in the arbitration of such summons or request and attendance.
- (5) A memorandum of every award made by the judge or by an arbitrator appointed by him.
- (6) A memorandum of every special case submitted to the judge, and of the proceedings and order thereon.
- (7) A memorandum of every judgment given by the Court of Appeal on any appeal.
- (8) A memorandum of every application to the court for the examination of an employer pursuant to Rule 35, paragraph 2, and of the order and proceedings thereon.
- (9) A memorandum of every application to the court for the detention of a ship pursuant to section 11 of the Act and Rules 37 and 38, and of the order and subsequent proceedings thereon.
- (10) A memorandum of every application to the judge for the appointment of an arbitrator in case of the death or refusal or inability to act of an arbitrator agreed on by the parties, and of the proceedings and order thereon.
- (11) A copy of every memorandum sent to the registrar pursuant to paragraph 9 of the second schedule to the Act and of the report of any of the medical referee annexed thereto, with a note stating whether such memorandum was recorded without further proof, or after inquiry, or by order of the judge.

- (12) If such memorandum is recorded after inquiry, a memorandum of the inquiries made and of the result thereof.
- (13) If such memorandum is recorded by order of the judge, a memorandum of the application to the judge, and of the order made thereon.
- (14) If in the case of a memorandum of an agreement the registrar refers the matter to the judge a memorandum of such reference and of the directions of the judge and the subsequent proceedings and order thereon.
- (15) A memorandum of the result of every taxation or review of taxation of costs under any such memorandum or under any award or order.
- (16) A memorandum of every application to rectify the register in respect of any memorandum and of the proceedings and order thereon.
- (17) A memorandum of every application or report with reference to the removal of the record of a memorandum of an agreement from the register and of the subsequent proceedings and order thereon.
- (18) A memorandum of every application to the judge or arbitrator under paragraph 11 of the second schedule to the Act to determine the amount of costs to be paid to a solicitor or agent and of the proceedings and order thereon, and of the result of any taxation or review of taxation under such order.
- (19) A copy of every certificate under subsection 1 of section 1 of the Act given by the court or sent to the registrar from any other court.
- (20) A memorandum of every proceeding taken in the court for the enforcement of any award, order, memorandum, or certificate, and of the result of such proceeding.
- (21) A memorandum of every application to refer a matter to a master's referee pursuant to paragraph 15 of the first schedule of the Act and of the order and subsequent proceedings thereon.
- (22) A memorandum of every application to the court for the suspension of the right to compensation or to take or prosecute any proceedings under the Act in relation to compensation, or of the right to weekly payments, and of the proceedings and order thereon.

- (23) A memorandum of every sum paid into court pursuant to paragraph 5 of the first schedule to the Act or under any award, memorandum or certificate.
- (24) A memorandum of every application made to the court with reference to any such sum, and of every order made on such application, and of the manner in which such sum is invested, applied or disposed of.
- (25) A memorandum of every application for the payment of any weekly payment into court, and of the proceedings and order thereon, and of the directions given as to the payment out or application of any such weekly payment.
- (26) A memorandum of every application for variation of an order of the court as to the apportionment, investment, or application of any sum paid as compensation, and of the proceedings and order thereon.
- (27) A memorandum of every application to refer a matter to a medical referee pursuant to paragraph 18 of the first schedule to the Act in the case of a workman intending to cease to reside in the United Kingdom, and of the order, and the proceedings thereon, and of every certificate and declaration of identity and request for payment received from such workman, and of the proceedings thereon.
- (28) A memorandum of every application to set aside or vary an award or order under Rule 70 and of the proceedings and order thereon.
- (29) A memorandum of every certified copy given pursuant to Rule 71 or a copy of every certified copy filed pursuant to that rule.
- (30) A memorandum of every application for transfer, and of the order thereon, and the proceedings under such order.
- (31) A memorandum of the transmission of documents and certified copies pursuant to paragraph 11 of Rule 37 or paragraphs one or two of Rule 38.
- (32) A memorandum of the transfer of any money paid into court to any other court.
- (33) The like memorandum as to every matter transferred, or document or certified copy^a transmitted or money transferred to the court, as would have been recorded as to such matter, document, or money if it had been originally commenced and presented in or transmitted to or paid into the court.

- (31) A memorandum of any other matter which the judge shall order to be recorded with reference to any matter brought into or proceeding taken in the court under the Act

Reference to Medical References

References to
medical
references

82 (1) Where a medical reference is summoned as an assessor, or any matter is referred to a medical reference, such reference shall be summoned or the matter shall be referred subject to and in accordance with any regulations made by the Secretary of State and the Treasury, and any such regulations shall so far as they affect the County Court or an arbitrator appointed by the judge of the County Court and proceedings in the County Court or before any such arbitrator be deemed to be Rules of Court and shall have effect accordingly.

Provisions
under Act
§ 9(1)(j).

(2) In particular, if such regulations as in the preceding paragraph mentioned provide that an employer or a workman who desires any matter to be referred to a medical reference under paragraph (1) of sub-section 1 of section 8 of the Act shall apply to the registrar of a county court for the matter to be so referred, it shall be the duty of the registrar to refer the same in accordance with such regulations.

Record and
returns as to
references

(3) The registrar shall keep a record in the form prescribed by regulations made by the Secretary of State of all cases in which medical references are summoned as assessors or matters are referred to medical references, and shall forward a copy of the same to the Secretary of State at such times as may be prescribed by such regulations.

Matters how distinguished

Matters, how
distinguished.

83 Every matter brought into the court under the Act shall be intitled in the matter of the Act and shall be distinguished by a separate number, and all documents filed and subsequent proceedings taken in the court with reference to such matter shall be intitled in like manner and shall be distinguished by the same number, and the entries made in the special register with respect to each such matter shall be entered together and shall be kept separate from the entries with respect to any other matter.

Forms

Forms in
Appendix or
like forms
may be used

84 The forms in the Appendix, where applicable, and where they are not applicable for as of the like character with such variations as the circumstances may require, may be used in proceedings under the Act.

Workmen's Compensation Rules, 1907 767

APPENDIX

Form I

*Application for Arbitration or for Report of Workmen's Compensation
Compensation payable or not*

In the County Court of _____, holden at _____,
In the matter of the Workmen's Compensation Act, 1906
No. of Matter _____
In the matter of an Arbitration between _____

A.B. _____
of _____
the _____

Applicant,

and

C.D. & Co., Limited
of _____
the _____ Respondent

1. On the _____ day of _____, 19____, at _____, a workman employed by C.D. & Co., Limited, _____, a contractor with C.D. & Co., Limited, _____, of _____, sustained an injury to his _____

2. A question has arisen from the injury as to whether the said A.B. is a workman to whom the above-mentioned Act applies, or as to the liability of the said C.D. & Co., Limited, to pay compensation under the above-mentioned Act in respect of the said injury, or as to the amount or duration of the compensation payable by the said C.D. & Co., Limited, to the said A.B. under the above-mentioned Act in respect of the said injury.

3. An arbitration under the above-mentioned Act has been requested between the said A.B. and the said C.D. & Co., Limited, for the settlement of the said question or questions.

4. Particulars are hereto appended as indicated.

PARTICULARS

1. Name and address of Applicant.
2. Name, place of business, and nature of business of respondent.
3. Nature of employment of applicant at the time of accident, and whether employed under respondent or under a contractor with him. *[If employer under a contractor who is not a respondent, name and place of business of contractor to be stated.]*

PARTICULARS—continued

4 Date and place of accident, nature of work on which workman was then engaged, and nature of accident and cause of injury

5 Nature of injury.

6 Particulars of incapacity for work, whether total or partial, and estimated duration of incapacity

7 Average weekly earnings during the 12 months previous to the injury, if the applicant has been so long employed under the employer by whom he was immediately employed, or if not during any less period during which he has been so employed

8 Average weekly amount which the applicant is earning or is able to earn in some suitable employment or business after the accident

9 Payment, allowance or benefit received from employer during the period of incapacity

10 Amount claimed as compensation

11 Date of service of statutory notice of accident on respondent, and whether given before workman voluntarily left the employment in which he was injured. [A copy of the notice to be attached]

12 If notice not served, reason for omission to serve same

The names and addresses of the applicant and his solicitor are
Of the Applicant,

Of his Solicitor,

The name and address of the respondent to be served with this application are

Dated this day of

(Signed)

Applicant.

{ Or

Applicant's Solicitor

Form 2.

Application for Arbitration by or on behalf of Dependents of Deceased Workman, with respect to the Compensation payable in respect of his Injury, the said Dependents, where there has been a fall from an height to the Workman, and the Settlement of Questions as to the Compensation, and the Appointment and Application of said Compensation.

In the County Court of _____ at _____

In the matter of the Workmen's Compensation Act, 1906
No. of Matter _____

In the matter of an Arbitration between

E.F.

of (address)
(description)

and

Applicant,

G.D. & Co., Limited,
of (address)
(description)
and

G.H.

of (address)
(description)

Respondent,

[or as the case may be.]

1. On the _____ day of _____ personal injury by accident arising out of and in the course of his employment was caused to A.B. late of _____, deceased, a workman employed by G.D. & Co., Limited, [or by _____ a contractor with G.D. & Co., Limited, for the execution of work under a contract then made on the _____ day of _____ the death of the said A.B. resulted from the injury.]

2. A question has [or Questions have] arisen

[here state the question, questions and those as to which arisen are] -

- (a) as to whether the said A.B. was a workman to whom the above-mentioned Act applied, or
- (b) as to the liability of the said G.D. & Co., Limited, to pay compensation under the above-mentioned Act to the dependant of the said A.B. in respect of the injury caused to them by the death of the said A.B., or
- (c) as to the amount of compensation payable to the said G.D. & Co., Limited, to the dependant of the said A.B. under the above-mentioned Act in respect of the injury caused to them by the death of the said A.B., or
- (d) as to who are dependants of the said A.B. within the meaning of the above-mentioned Act, or
- (e) as to the apportionment and application of the compensation payable by the said G.D. & Co., Limited, to the dependants of the said A.B. in respect of the injury caused to them by the death of the said A.B.

[or as the case may be.]

3. An arbitration under the above-mentioned Act is hereby requested between E.F., the legal personal representative of the

said A.B., _____, acting on behalf of the dependants of the said A.B. _____ for between B.C. _____, a dependant of the said A.B. _____ and the said C.D. & Co., Limited _____ and G.H. _____, who claims or may be entitled to claim to be a dependant of the said A.B. _____

(to be inserted in margin of the Form)

for the settlement of the indemnification question.

(Particulars are to be appended to and annexed to)

PARTICULARS

1. Name and late address of deceased workman.

2. Name, place of business and nature of business of dependant from whom compensation is claimed.

3. Nature of employment of deceased at time of accident, and whether employed under a contract or under a contract with him. *If employed under a contract, state, not a position, name and place of business of employer at time of death.*

4. Date and place of accident, nature of collision in which deceased was then engaged and nature of accident and cause of injury.

5. Nature of injury to deceased, and date of death.

6. Duration of deceased during the 5 years next preceding the injury, if he had been out of the employment of the employer by whom he was immediately employed, or if the period of his employment had been less than the said 5 years, particulars of his average weekly earnings during the period of his actual employment under the said employer.

7. Amount of weekly payments (if any) made to deceased under the Act, and of any lump sum paid in redemption thereof.

8. Name and address of applicant for arbitration.

9. Character in which applicant applies for arbitration, i.e., whether as legal personal representative of deceased or as a dependant, and if as a dependant, particulars showing how he is so.

PARTICULARS—continued.

10. Particulars as to dependants,
if deceased by whom or on whose
behalf the application is made,
giving their name and address,
and description and occupation,
(if any), and their relationship to
the deceased, and if infant, their
respective age, and stating whether
they were wholly or partially de-
pendent on the earnings of the
deceased at the time of his death.

11. Particulars as to any person
claiming to be dependant, but who
is not a claimant, giving names and
addresses, and stating whether he is
wholly or partially dependant,
with their name, address, and
description and occupation, (if
any).

12. Particulars as to amount claimed
as compensation, and of the manner
in which the applicant claims to
have such amount ascertained and
applied.

13. Date of service of statutory
notice of accident on the person
from whose compensation is claimed,
and whether such notice is given
voluntarily, for the compensation
which he was entitled to expect at
the date of the accident.

14. If notice not served, reason
for omission to do so.

The name and address of the applicant and his solicitor are
On the Applicant,

Of his Solicitor,

The name and address of the person to be served with this
application are
C. D. & Co., Limited

of H.

Dated this . . . day of . . .

(Signed)

Applicant

(Or

Applicant's Solicitor)

3. An arbitration under the above-mentioned Act is hereby requested between E. F., the legal personal representative of the said A. B., acting on behalf of N. O., P. R., etc., dependants of the said A. B., on the one hand, and the said C. D. & Co., Limited, and the said G. H., J. K., and L. M., who are claimed or may be entitled to compensation as dependants of the said A. B., on the other hand.

for the settlement of the said question for question.

1. Particulars are here to appended for name of

PARTICULARS.

1. Name and late address of deceased workman.

2. Name and place of business of employer to whom compensation has been paid or is payable.

3. Date of accident to deceased, and date of death.

4. Amount or estimated amount of compensation to be paid to dependent of deceased.

5. Particulars as to whether the compensation is to be paid by the employer or by the dependant, and if so, by whom, and in whole or in part.

6. Character in which the applicant applies for arbitration, i.e., whether as legal personal representative of deceased or as a dependent, and if a dependent, particulars showing how he is a dependent.

7. Particulars as to the dependants or person claiming to be dependent, by whom or on whose behalf the application is made, giving their name and address, and description and occupation (if any), and their relationship to the deceased, and if infants, their respective ages, and stating whether they were or claim to have been wholly or partially dependent on the earnings of the deceased at the time of his death.

8. The like particulars as any dependants who are made respondents.

[NOTE.—If there is a legal personal representative, and he is not the applicant, he must be made a respondent.]

PARTICULARS—*continued*

9. Particulars as to any person claiming or who may be entitled to claim to be dependant, but as to whose claim a question arises, and who are therefore made to pendant, with their name, address, descriptions, and occupations (if any).

10. Particulars of the manner in which the applicant claims to have
- the amount of compensation ascertained and applied.

The names and addresses of the applicant and his dependants are

Of the Applicant,

Of his Solicitor,

The names and addresses of the dependants to be covered by application are

C. D. & Co., Limited

G. H.

L. K.

T. M.

(or as *here or there*)

Dated the day of

(Signed)

Applicant

, Of

Applicant's Solicitor

PARTICULARS.

1 Name and late address of deceased workman.

2 Name, place of business, and nature of business of respondent from whom compensation claimed.

3 Nature of employment of deceased at time of accident, and whether employed independent or under a contractor with him. *[If employed under a contractor, it is not a respondent, name and place of business of contractor to be stated.]*

4 Date and place of accident, nature of work on which deceased was then employed, and nature of accident and cause of injury.

5 Nature of injury to deceased, and date of death.

6 Name and address of applicant for arbitration.

7 Particulars in which applicant applies for arbitration, i. e., whether as legal personal representative of deceased or as a person to whom expenses in respect of which compensation is payable are due, and if the latter, particulars must be given of the circumstances under which the expenses are claimed to be due to the applicant.

8 Particulars, as to any other persons who claim that expenses in respect of which compensation is payable are due to them, and who are therefore made respondents, with their names and addresses.

9 Particulars of amount claimed as compensation, and of the manner in which the applicant desires such amount to be apportioned and applied.

10 Date of service of statutory notice of accident on respondent from whom compensation is claimed, and whether given before deceased voluntarily left the employment in which he was injured. *[A copy of the notice to be annexed.]*

11 If notice not served, reason for omission to serve same.

Workmen's Compensation Rules, 1907 777

The names and addresses of the applicant and his solicitor are

Of the Applicant,

Of his Solicitor,

The names and addresses of the respondent, to be served with this application are

C.D. & Co., Limited

G.H.

Dated this day of

(Signature)

Applicant

1907

Applicant's Solicitor

For and to

Application for Arbitration under the Workmen's Compensation Act, 1906, in the matter of the Workmen's Compensation

In the County Court of (Judge's name)

In the matter of the Workmen's Compensation Act, 1906.

No. of Matter

In the matter of an Arbitration between

C.D. & Co., Limited,

of (address)

(description)

Applicants,

and

A.B.,

of (address)

(description)

Respondent.

[or as the case may be, see Act, Sched. 1, pars. 16, 17]

An arbitration under the Workmen's Compensation Act, 1906, is hereby requested between C.D. & Co., Limited, and A.B.

[or as the case may be, see Act, Sched. 1, pars. 16, 17]

with respect to the review and termination, or diminution, increase, or redemption, as the case may be, of the weekly payment payable to the said A.B. under the said Act in respect of personal injury caused to him by accident arising out of and in the course of his employment

Particulars are hereto appended, or annexed,

B.E.L.

3 E

In the matter of an Arbitration between

A.B.

of (addressee)
(description)

Applicant,

and

The owners of the Ship

Respondent.

1. On the day of 19 at the place of accident arising out of and in the course of his employment as witnessed by A.B., the master of the ship, for a sum or an appointment to the service or an appointment in the fishing service and number of the crew of the ship, for a pilot employed on the ship.

2. A question has been put forward by the

party to the arbitration, who has proposed to the arbitrator

(a) as to whether the said A.B. was a seaman within the meaning of the above mentioned Act, or

(b) as to the liability of the owner of the said ship to pay compensation under the above mentioned Act in respect of the said injury, or

(c) as to the amount or duration of the compensation payable by the owner of the said ship to the said A.B. under the above mentioned Act in respect of the said injury.

[Signature of Arbitrator]

3. An arbitration under the above mentioned Act is hereby requested between the said A.B. and the owner of the said ship for the settlement of the said question or questions.

4. Particulars are hereby appended as follows:

PARTICULARS

1. Name and address of applicant

2. Name of ship of which applicant was master or of the vessel of which applicant was a member or on which applicant was employed as a pilot at time of accident, and port of registry

3. Nature of employment at time of accident

4. Date and place of accident, nature of work on which applicant was then engaged, and nature of accident and cause of injury

5. Nature of injury

6. Particulars of incapacity for work, whether total or partial, and estimated duration of incapacity

PARTICULARS—*continued*

7. Average weekly earnings during the 12 months previous to the injury, if the applicant has been so long employed under the same owners, or if not, during any 12 months period during which he has been so employed.

8. Average weekly amount which the applicant is capable or able to earn in some suitable employment or business after the accident.

9. Payment, allowance or benefit received from employer during the period of incapacity.

10. Amount claimed as compensation.

11. Date of service of statutory notice of accident, and whether given before applicant voluntarily left the employment in which he was injured. [*A copy of the notice to be annexed.*]

12. If notice not served, reason for omission to serve same.

The names and addresses of the applicant and his solicitor are

Of the Applicant,

Of his Solicitor,

The name and address of the person to be served with this application as representing the owners of the ship are

[*State name and address of managing owner or manager, or of master, per Rule 50 (9).*]

Dated this day of ,

(Signed)

Applicant

[Or

]

Applicant's Solicitor.]

Form 7

Application for Adjudication by or on behalf of Dependents of Deceased
Master, Seaman, Apprentice, or Pilot

In the County Court of _____, holden at _____
In the matter of the Workmen's Compensation Act, 1906
No. of Matter _____

In the matter of an Adjudication between

M. F.,
of (address)
(description) _____ and _____ Applicant.

The owners of the ship "_____
and _____

(G.B.,
of (address)
(description) _____ Respondents,
[or as the case may be.]

That on the _____ day of _____ personal injury by accident and misadventure to and in the course of employment occurred to A.B. late of _____, deceased, the master of the ship "_____" an apprentice in the said ship and a member of the crew of the said ship, and a pilot employed on the said ship, and on the _____ day of _____ the said ship and A.B. _____, and resulted from the same.

That the ship _____ was at the port of _____ on or about the _____ day of _____, and that by mutual consent on or about the _____ day of _____ the said ship was chartered on or about the _____ day of _____ and was held to have been let to full hire.

When the said ship left the said port A.B. _____, late of _____, was the master thereof or a seaman or an apprentice to the said service or an apprentice in the said ship, and a member of the crew of the said ship, or a pilot employed on the said ship.

2. Application has been made to the court in

which state of questions, specified in the following provisions,

(a) as to whether the said A.B. _____ was a workman within the meaning of the above-mentioned Act, or

(b) as to the liability of the owner of the said ship to pay compensation under the above-mentioned Act to the dependants of the said A.B. _____ in respect of the injury caused to them by the death of the said A.B. _____, or

(c) as to the amount of compensation payable by the owner of the said ship to the dependants of the said A.B. _____ under the above-mentioned Act in respect of the injury caused to them by the death of the said A.B. _____, or

(d) as to who are dependants of the said A.B. _____ within the meaning of the above-mentioned Act, or

(e) as to the apportionment and application of the compensation payable by the owners of the said ship to the dependants of the said A.B. _____ in respect of the injury caused to them by the death of the said A.B. _____

[or as the case may be.]

3. An arbitration under the above-mentioned Act is hereby requested between P.P., the legal personal representative of the said A.B. (or between P.P. as a dependant of the said A.B.) and the owner of the said ship, and C.B., who claims or may be entitled to claim to be a dependant of the said A.B., (or in the case may be, see Rule 1

for the settlement of the said question or questions)

1. Particulars are hereto appended (or annexed)

PARTICULARS

1. Name and late address of master, captain, purser, or pilot

2. Name of ship of which deceased was master (or of the crew of which deceased was a member) or which deceased was employed as pilot at time of accident or loss of ship, and port of registry

3. Nature of employment at time of accident or loss of ship

4. Date and place of accident, nature of work on which deceased was then engaged, and nature of accident and cause of injury, or date and place when and where ship was lost or deceased is deemed to have been lost

5. Nature of injury to deceased and date of death or date when ship was lost or deemed to have been lost

6. Earnings of deceased during the 3 years next preceding the injury or date of loss, or had been so long employed under the same owner or at the period of his employment had been less than the said 3 years, particulars of his average yearly earnings during the period of actual employment under the said owners

7. Amount of weekly payment (if any) made to deceased under the Act, and of any lump sum paid in redemption thereof

8. Name and address of applicant for arbitration

9. Character in which applicant applies for arbitration, i.e., whether as legal personal representative of deceased or as a dependant, and if as a dependant, particulars showing how he is so

PARTICULARS—continued

10. Particulars as to the dependants of deceased by whom or on whose behalf the application is made, giving their names and addresses, and description and occupations (if any) and their relationship to the deceased and if infants, their respective ages, and stating whether they were wholly or partially dependent on the earnings of the deceased at the time of his death.

11. Particulars as to any person claiming or who may be entitled to claim to be dependants, but not to whose claim a question arises, and who are therefore made respondents with their names, addresses and description and occupation (if any).

12. Particulars of unpaid claims as compensation and funeral expenses which the applicant claims to be such monies as are claimed and applied.

13. Particulars of notice of fatal accident received, and of the given notice received voluntarily left the employer or in which he was injured (except if it is a case of death).

14. If not claimed, a declaration for and on behalf of the

The name and address of the applicant and his solicitor, or of the Applicant of his solicitor.

The name and addresses of the respondents to be served with this application are

As representing the owner of the ship

(State name and address of master, if it is a case of injury on board of ship—See Rules 60 and 61)

and G.B.

Dated this _____ at _____

(Signed)

Applicant

or

Applicant's Solicitor

Form 8

Application for Arbitration under Section 5, which is given on behalf of the Owners of a Ship under Section 11

In the County Court of _____, to be held at _____.

In the matter of the Workmen's Compensation Act, 1906.

No. of Matter _____

In the matter of an Arbitration between

A B,

of (address)
(description)

and

Applicant,

(names and addresses
of persons giving
security)

the respondent

1. On the _____ day of _____, _____, personal injury by accident arising out of and in the course of his employment sustained to A B _____, and _____, and the said A B _____ claim that the owner of the ship _____ is liable under the Workmen's Compensation Act, 1906, to pay compensation in respect of the said injury.

2. The respondent has been compelled to abide the cost of my proceedings that may be incurred in respect of the said injury and to pay such compensation and costs may be awarded thereon.

3. A question for arbitration have arisen

here stated by and between the parties to this arbitration, to-wit:

(a) as to whether the said A B _____ is entitled to claim the above-mentioned Act applies to _____

(b) as to the liability of the owner of the said ship to pay compensation under the above-mentioned Act in respect of the said injury, or

(c) as to the amount or duration of the compensation payable to the said A B _____ under the above-mentioned Act in respect of the said injury.

(or, for costs only)

4. An arbitration under the above-mentioned Act is hereby requested between the said A B _____ and the respondent for the settlement of the said question or questions.

5. Particulars are hereby appended or annexed.

PARTICULARS

These must particularise the circumstances under which the application is made, and of the facts on which the applicant relies, amongst the particulars in the prescribed form to the circumstances of the case.

The names and addresses, etc., are in Form 1.]

NOTE.—This form has been adapted as required to an application for arbitration as between the dependents of a deceased workman and the persons giving security.

FOUNTAIN

Applicant for the benefit of Workmen's Compensation Act, 1906, in respect of an accident at Fountaine's 'Cold Chisel' Disease Company, vide Section 8

In the County Court of Middlesex
In the matter of the Workmen's Compensation Act, 1906
No. of Matter
In the matter of an Application between

A.B.,
of (address)
(the Applicant) and

C.D. & Co., Limited,
of (address)
(the Respondents)

1. On the day of 1906, Mr. A.B., the Applicant, was employed under the Factory and Workshop Act, 1901, for the district of Middlesex, as one of the employees of the Applicant by the Secretary of State for the purpose of the Workmen's Compensation Act, 1906, and that A.B. of was suffering from a disease common within the provisions of the Workmen's Compensation Act, 1906, and that the disease complained of was at the time of which he was employed

2. On the day of 1906, A.B. was in possession of special rate of compensation under the Factory and Workshop Act, 1901, and that he was entitled to compensation in respect of his injury sustained on the day of 1906, and that he was suffering from a disease common within the provisions of the Workmen's Compensation Act, 1906.

3. The said A.B. was suffering from the disease mentioned above, and that the nature of his employment in the said employment was such that he was entitled to compensation in respect of his injury sustained on the day of 1906, and that he was suffering from a disease common within the provisions of the Workmen's Compensation Act, 1906.

4. A question has arisen from the above facts as to whether the said A.B. is entitled to compensation under the Workmen's Compensation Act, 1906, in respect of his injury sustained on the day of 1906, and that he was suffering from a disease common within the provisions of the Workmen's Compensation Act, 1906.

(a) as to whether the said A.B. is entitled to compensation under the Workmen's Compensation Act, 1906, in respect of his injury sustained on the day of 1906, and that he was suffering from a disease common within the provisions of the Workmen's Compensation Act, 1906.

(b) as to whether the said A.B. is entitled to compensation under the Workmen's Compensation Act, 1906, in respect of his injury sustained on the day of 1906, and that he was suffering from a disease common within the provisions of the Workmen's Compensation Act, 1906.

(c) as to whether the said disease is due to the nature of the employment of the said A.B. under the said C.D. & Co., Limited, or

(d) as to the amount (or duration) of the compensation payable by the said C.D. & Co., Limited, to the said A.B. under the Workmen's Compensation Act, 1906, in respect of the said disease

[or as the case may be]

4. An arbitration under the above-mentioned Act is hereby requested between the said A B and the said C D, & Co., Limited, for the settlement of the said question or question.

5. Particulars are here appended to be annexed.

PARTICULARS

1. Name and address of applicant.

2. Name, place of business, and nature of business of respondent.

3. Nature of employment of applicant under respondents to which the dispute was due.

4. Nature of dispute.

5. Date of discharge or suspension.

6. Names and address of all other employers to whom applicant was employed in the same employment during the 12 months previous to date of discharge or suspension.

7. Particulars of wages, for work, while total of period and estimated duration of employment.

8. Average weekly earnings during the 12 months previous to date of discharge or suspension, if the applicant has been a bona fide employed under respondent, or if not, during any 12 months during which he has been so employed.

9. Average weekly amount which the applicant is claiming or entitled to earn in bona fide employment or business.

10. Payment allowance or benefit received from employer during period of unemployment.

11. Amount claimed in compensation.

12. Date of service of statutory notice of discharge or suspension on respondents. (1 copy of the notice to be annexed.)

13. If notice not served, reason for omission to serve same.

The names and addresses, etc. [as in Form 1.]

1. **THEORY**

In the coming month of October, the

In the County Court at ... before me on ...

In the next part of the Women's Rights Campaign Act, 1900,

Summary

In the method of Abolitionists but we can

١٢١

of *habitus* is
(*habitus* *habitus*)

Адрес: _____

and

CPA (continued)

(11)

$$\begin{pmatrix} 1 & 0 & 0 \\ 0 & 1 & 0 \\ 0 & 0 & 1 \end{pmatrix}$$
16. spontaneous

1911 年 1 月 1 日 至 1912 年 1 月 1 日

[illegible]

On 4/1/84, the day after the ATFA was passed, and before the regulations made under the Factory and Workshop Act 1901, responded from his usual employment on a number of his friends' requests to do some casual work earning within a number of the Workshop Compensation Act 1906, and on the day of the ATFA, he was asked to do some casual work, but, due to being called by the police, he did not do any work.

(On the dock, he, the other men, and I, the title of the
 running with a group of the Women's League, and on the
 1900s.

2. The applicant has asked that the unemployment disability benefit be the nature of the employment of the two A.B. 209 employees. The applicant has stated that the employee, if disabled, would be able to perform the same or similar work within the twelve month period to his disability in a position of, if the employee, if disabled, could not perform the same or similar work, or was not at the time of disability, except for a reasonable period of time or amount of disability, within the twelve month period to his disability. B & Co., Limited.

3 A question has to be put: how have we arrived

[there state the questions, specifying only those which have arisen,
eg]

(a) as to whether the said A B was a workman to whom the Workmen's Compensation Act, 1906, applied, or

- (b) as to the liability of the said C D & Co., Limited, to pay compensation under the Workmen's Compensation Act, 1906, to the dependants of the said A B in respect of the injury caused to them by the death of the said A B
- (c) as to whether the said disease was in fact contracted whilst the said A B was in the employment of the said C D & Co., Limited,
- (d) as to whether the said disease was due to the nature of the employment of the said A B under the said C D & Co., Limited,
- (e) as to whether the death of the said A B was in fact caused by the said disease,
- (f) as to the amount of compensation payable by the said C D & Co., Limited, to the dependants of the said A B under the above-mentioned Act in respect of the injury caused to them by the death of the said A B
- (g) as to who are dependants of the said A B within the meaning of the above-mentioned Act, or
- (h) as to the apportionment and application of the compensation payable by the said C D & Co., Limited, to the dependants of the said A B in respect of the injury caused to them by the death of the said A B

4. An arbitration under the above-mentioned Act is hereby requested between F P, the legal personal representative of the said A B, acting on behalf of the dependants of the said A B (or between F P, a dependant of the said A B and the said C D & Co., Limited) and G H, when claimant may be entitled to claim to be a dependant of the said A B for the settlement of the said question or question.

5. Particulars are here appended as annexed.

PARTICULARS

- 1 Name and late address of deceased workman
- 2 Name, place of business, and nature of business of dependants from whom compensation is claimed
- 3 Nature of employment of deceased under dependants to which the disease was due
- 4 Nature of disease
- 5 Date of disablement, and date of death
- 6 Earnings of deceased during the 3 years next preceding disablement, if he has been so long in the employment of the respondents, or if the period of his employment has been less than the said 3 years, particulars of his average weekly earnings during the period of his actual employment under the respondents.

PARTICULARS *continued*

7 Name, and addresses of all other employers by whom deceased was employed in the same employment during the 12 months previous to the date of disablement

8 Amount of weekly payments (if any) made to deceased under the Act, and of any lump sum paid in redemption thereof

9 Name and address of applicant for indemnity

10 Particulars in which applicant applies for indemnity, and whether a legal personal representative of deceased or a dependant, and if as a dependant, particulars showing how he is so

11 Particulars as to dependant of deceased by whom or on whose behalf the application is made, giving their name and address, and description and occupation (if any) and their relationship to the deceased, and stating their respective ages, and stating whether they were wholly or partially dependent on the earnings of the deceased at the time of his death

12 Particulars as to any person claiming or who may be entitled to claim to be dependants, but as to whose claim a question arises, and who are therefore made dependent, with their name, address, and description and occupation (if any)

13 Particulars of amount claimed as compensation, and of the manner in which the applicant claims to have such amount ascertained and applied

14 Date of service of statutory notice of disablement [*A copy of the notice to be annexed*]

15 If notice not served, reason for omission to serve same

The names and addresses, etc. given *Form 2*

Form H

*Application for Arbitration between Employer and Employee against Insurers,
as Transferred to Workmen under Section 2*

In the County Court at _____, to be held at _____
In the matter of the Workmen's Compensation Act, 1906,
No. of matter _____

In the matter of an Arbitration between

A.B.
of (name and
(description) _____, Applicant,
(name and address of _____, and
Insurer) _____, Respondent

1. On the _____ day of _____ personal injury by accident
arising out of and in the course of his employment was caused to A.B.
a workman employed by _____
of _____ (name and address of contractor or
for the _____ of _____, a contractor or
(name and address of employer) for the execution of work undertaken by
him, and the said _____ (name of the said employer)
then upon became liable to pay compensation under the Workmen's Com-
pensation Act, 1906, to the said A.B. in respect of such injury.
(Or, when weekly payment has been made,

1. Under an agreement or understanding entered into the day of _____
in this court on the _____ day of _____, compensation is
payable by _____ of _____ (name and address
of employer) to the above-mentioned A.B. in respect of compensation
for personal injury caused to the said A.B. _____ (name of the
arising out of and in the course of his employment as a workman employed
by the said _____ (employer) or by
of _____, a contractor or with the said _____ (employer)
for the execution of work undertaken by him.)

2. The respondents are insurers of the said _____
(employer) in respect of his [or their] liability to pay such compensation.

3. The said _____ (employer) has become a bankrupt or
made a composition or arrangement with his creditors, or, if the employer
is a company, the said _____ has commenced to be wound up,
and the rights of the said _____ (employer) against the
respondents as such insurers in respect of his [or their] liability to the
said A.B. have by virtue of section 2 of the said
Act been transferred to and vested in the said A.B.

4. A question has [or questions have] arisen
between the parties, specifying which of these questions are:

- as to whether the said A.B. _____ is a workman to whom
the above-mentioned Act applies, or
- as to the liability of the said _____ (employer) to pay
compensation under the above-mentioned Act in respect of the
said injury, or
- as to the liability of the respondents as such insurers as aforesaid
to the said A.B. _____, or
- as to the amount [or duration] of the liability of the respondents
as such insurers as aforesaid to the said A.B. _____,

or as the case may be.]

5 An arbitration under the above-mentioned Act is hereby requested between the said A B and the respondents for the settlement of the said question [or questions]
b Particulars are hereto appended [or annexed]

PARTICULARS

(Here insert particulars containing a concise statement of the facts and circumstances which apply to the case, and of all matters in respect of which it is desired to have the questions to be referred properly stated, giving an indication of the nature and character of the questions, and following the instructions given in the preceding form to the enumeration of the case.)

The names and addresses of the applicant and his solicitor are

Of the Applicant,

Of his Solicitor,

The name and address of the respondent, to be given with this application are

Dated this day of

(Signed)

Applicant

By

Applicant's Solicitor

Not to be taken to be a statement of facts, or an admission of liability, or a statement of damages, or a statement of any other matter, unless so intended and so stated.

Form 12

Notice to Applicant of Day upon which Arbitration will be proceeded with.

Heading as in Form 1 for Arbitration.

TAKE NOTICE, that the judge of the Court for Mr. the arbitrator appointed by the judge of this Court] will proceed with the arbitration in this matter at on the day of at the hour of o'clock in the noon

Dated this day of

To

Of

Registrar.

Form 13

Notice to Respondent in Dispute upon which the other side has proceeded with the Arbitration in Response to a Notice

TAKE NOTICE, that the judge of this Court or Mr. _____ the arbitrator appointed by the judge of this Court will proceed with the arbitration applied for in the report and particulars, a copy of which is served herewith at _____ on the _____ day of _____ at the hour of _____ o'clock in the _____ month and that if you do not attend either in person or by your solicitor at the time and place above mentioned such order will be made and proceedings taken in the matter as arbitrator may think just and expedient.

And further take notice, that if you wish to dispute any matter in the subject-matter of the arbitration, or consider that the applicant's particulars are in any respect inaccurate or incomplete or deficient, you, in fact or document to the notice of the judge or arbitrator, or intend to rely on any fact, or to deny wholly or partially your liability to pay compensation under the Act, you must file with me an answer, stating your name and address and the name and address of your solicitor if any, and stating that you dispute any matter in the subject-matter of the arbitration, or stating in what respect the applicant's particulars are inaccurate or incomplete, or stating concisely any fact or document which you desire to bring to the notice of the judge or arbitrator, or on which you intend to rely, or the ground, on and extent to which you deny liability to pay compensation.

Such answer together with a copy thereof for the judge or arbitrator, and a copy for the applicant and for each of the other respondents, must be filed with me ten clear days at least before the _____ day of _____.

If no answer is filed, and subject to such answer, if any, the applicant's particulars and your liability to pay compensation will be taken to be admitted.

Dated this _____ day of _____,
To _____
Of _____

Registrar.

Form 14

Answer by Respondents

[Not to be printed, but to be written on a separate sheet.]

[Heading as in Regulation 10, Arbitration Act 1926.]

TAKE NOTICE—

That the respondent, C 11, _____ disclaims any interest in the subject-matter of the above arbitration.

Or

That the respondents, C 12 & C 13, Limited, _____ state that the applicant's particulars filed in this matter are inaccurate or incomplete in the particulars hereto annexed.

Or

That the respondents, C 14 & C 15, Limited, _____ desire to bring to the notice of the judge [or arbitrator] the facts stated in the particulars hereto annexed.

(4)

That the respondent, C. D. & Co., Limited, intend at the hearing of the arbitration to cross-examine and rely on the facts stated in the particulars hereinafter set out.

(5)

That the respondent, C. D. & Co., Limited, deny their liability to pay compensation under the Act in respect of the injury to A. B. mentioned in the respondent's particulars on the ground stated in the particulars hereinafter set out.

PARTICULARS

1. *That respondent was the proprietor and partner in the business of respondent*
or respondent's

2. *That respondent is a person who is engaged in the service of the Employer*
At the time

That the applicant A. B. refused to submit himself to medical examination required by or obstruct the medical examination required by the respondent C. D. & Co., Limited, in accordance with paragraph 1 of the first schedule to the Act or refused to submit himself for examination or refused to refer a medical or obstruct the examination by a medical officer or doctor, in accordance with paragraph 1a of the first schedule to the Act.

and the court may

3. *Facts which the Respondents, C D & Co., Limited, intend to give in evidence and aver in the hearing of the Arbitration.*

That notice of the alleged accident, or of death, disability or suspension] was not given to the respondent[s] within the time limited by the Act, or

That the claim for compensation was not made on the respondent[s] within the time limited by the Act, or

That a claim for compensation on account of an injury to the workman of the respondent[s] C D & Co., Limited, [has been duly]

certified to the Registrar of Friendly Societies, and such certificate was in force at the date of the alleged accident and the respondent[s] C D & Co., Limited, [contracted] with the applicant [or with]

the deceased workman] by a contract [which was in force] at the date of the alleged accident that the provision of the Act [here] should be substituted for the provision of the Act and the respondent[s] C D & Co., Limited, [are consequently] liable only in accordance with the said scheme

or, if the respondent[s]

4. *Grounds on which the Respondents, C D & Co., Limited, intend to pay Compensation.*

(a) That the applicant [or with the deceased workman] was not a workman to whom the Act applied, or

(b) That the injury to the applicant [or deceased workman] was not caused by accident arising out of and in the course of his employment, or

(c) That the injury to the applicant [or to the deceased workman] was attributable to the disease and without the consent of the applicant [or of the deceased workman], and did not result in death or total permanent disability, or

(d) That at the time of the alleged accident the applicant [or the deceased workman] was not personally employed by the respondent[s], but was employed by [] of []

a contractor with the respondent[s] for the execution of, or under such contract of sub-contract to the respondent[s], and the accident occurred elsewhere than on or about premises on which the respondent[s] had undertaken to execute the work on which were otherwise under the control or management of the respondent[s], or

(e) That the injury to the applicant [or to the deceased workman] was caused under circumstances covering a legal liability in a person other than the respondent[s], to wit, [] name and address of such person to pay damages in respect thereof, and the applicant [or the deceased workman] has taken proceedings against that person and has recovered damages from him, or in case of marital disease,

(f) That the applicant [or the deceased workman] at the time of entering the employment of the respondent[s] wilfully and falsely represented himself in writing as not having previously suffered from the disease mentioned in the applicant's particulars, or

- (vi) That the disease mentioned in the applicant's particulars was not contracted whilst the applicant or the deceased workman was in the employment of the respondent, or
- (vii) That the disease mentioned in the applicant's particulars was not directly or indirectly the consequence of, or which the respondent or the deceased workman was employed to do, the respondent.

And further certifies that the name and address of the medical practitioner and the doctoring the

of the Respondent,

C. D. & Co., Limited,

of the said town of

Dated this day of

(Signed)

Solicitor for the Respondent,

To the Registrar of the Court, and C. D. & Co., Limited

To the Applicant, A.B., and

To the Respondent,

(if such, name of the firm)

FOURTH

Now, the Registrar of the Court hereby certifies that the said application was made for the purpose of obtaining a writ of Habeas Corpus, and for the purpose of obtaining a writ of Mandamus, and for the purpose of obtaining a writ of Prohibition.

And the Registrar of the Court hereby certifies that the said application was made for the purpose of obtaining a writ of Habeas Corpus, and for the purpose of obtaining a writ of Mandamus, and for the purpose of obtaining a writ of Prohibition.

And the Registrar of the Court hereby certifies that the said application was made for the purpose of obtaining a writ of Habeas Corpus, and for the purpose of obtaining a writ of Mandamus, and for the purpose of obtaining a writ of Prohibition.

That the said

That the Respondent, C. D. & Co., Limited, is liable to pay compensation to the deceased workman in the above mentioned matter.

And the Registrar of the Court hereby certifies that the said application was made for the purpose of obtaining a writ of Habeas Corpus, and for the purpose of obtaining a writ of Mandamus, and for the purpose of obtaining a writ of Prohibition.

And the Registrar of the Court hereby certifies that the said application was made for the purpose of obtaining a writ of Habeas Corpus, and for the purpose of obtaining a writ of Mandamus, and for the purpose of obtaining a writ of Prohibition.

And the Registrar of the Court hereby certifies that the said application was made for the purpose of obtaining a writ of Habeas Corpus, and for the purpose of obtaining a writ of Mandamus, and for the purpose of obtaining a writ of Prohibition.

Dated this day of

(Signed)

Solicitor for the Respondents,

To the Registrar of the Court, and C. D. & Co., Limited,

To the Applicant, A.B., and

To the Respondent,

(if such, name of the firm)

FORM B

*Notice of Claim of Respondent to an Award,
Including a Request for Arbitration*

TEXT NOTED -

That the respondent, C. D. & Co., Limited, have this day filed with me a notice (copy of which is set out here with) that they admit their liability to pay compensation in the above-mentioned matter, and submit to an award for payment by them to you of the sum of £

If you elect to accept such sum in satisfaction of your claim, you must send to the registrar of this Court, and to the said C. D. & Co., Limited, a written notice forthwith by post, or leave such notice at the office of the registrar, and at the residence or place of business of the said C. D. & Co., Limited.

If you send such notice, the judge of this Court will on application made to him, make an award directing payment of such sum to you, and you will be liable to no further cost.

In default of such notice the arbitration will be proceeded with, and if necessary weekly payment is awarded to you, you will be liable to be ordered to pay the costs incurred by the respondent subsequent to the receipt by you of this notice.

Dated this _____ day of _____

By, J. H. H.

To the Applicant, A. B.

FORM C

*Notice of Claim of the Court
Respondent to the Applicant*

TEXT NOTED -

That the respondent, C. D. & Co., Limited, have this day filed with me a notice that they ask of the Court a payment of compensation in the above-mentioned matter, and require payment of the sum of £
 _____ in satisfaction of such claim.

If you are willing to accept the sum so paid into Court in satisfaction of the compensation payable in the above-mentioned matter, you must send to the registrar of this Court, and to the said C. D. & Co., Limited, and to the other respondent, a written notice, *to be received by the respondent*, to the applicant, and the other respondent, a written notice forthwith by post, or leave such notice at the office of the registrar, and at the residence or place of business of the said C. D. & Co., Limited, and at the residence or place of business of each of the other respondents, and of the applicant, and each of the other respondents.

If you and all the other respondents or if you and the applicant and all the other respondents send such notice and agree as to the appointment and application of the said sum of £
 _____, the judge of this Court will, on application made to him, make an award for such appointment and application, and you will be liable to no further costs.

If you and all the other respondents or if you and the applicant and all the other respondents send such notice, but do not agree as to the appointment and application of the said sum of £
 _____, the arbitration will be proceeded with, as between you and such other respondents [or as between the applicant and yourself and such other respondents].

In default of such notice being sent to you and all other respondents by the applicant and you and all the other respondents to the arbitration shall be proceeded with and if no notice is sent then the said sum of £1000 shall be taken to be compensation, by parties who demand such notice will be liable to be ordered to pay the cost incurred by the respondents, C. D. & Co., Limited, in going to the receipt by respondents of the notice and of coming to arbitration and payment to the receipt of the notice by respondents who will notice of their willingness to accept the said sum of £1000 in satisfaction of the compensation payable in the above mentioned matter.

Dated this _____ day of _____ 19____
 By _____
 •
 For the Applicant, A. B.,
 or for the Respondent, C. D. & Co.,
 per _____

Form 18

Notice to parties of the receipt of a copy of the award made by the arbitrator.

To _____
Respondent, C. D. & Co., Limited.

Form 19

For the applicant, A. B., in the above matter, the sum of £1000 is to be the compensation, by parties who demand such notice will be liable to be ordered to pay the cost incurred by the respondents, C. D. & Co., Limited, in going to the receipt by respondents of the notice and of coming to arbitration and payment to the receipt of the notice by respondents who will notice of their willingness to accept the said sum of £1000 in satisfaction of the compensation payable in the above mentioned matter.

For the applicant, _____ of the respondent, C. D. & Co., Limited, will apply to the arbitrator to receive the award and in order to receive the said respondent, C. D. & Co., Limited, _____ of the respondent, _____, named by the applicant, _____ of the respondent, C. D. & Co., Limited, will be the second witness of the award, the said _____ and _____ of the respondent of the said sum of £1000 in satisfaction of the compensation payable in the above mentioned matter.

Dated this _____ day of _____ 19____
 per _____
 Applicant
 or
 To the Arbitration of the Court and
 To the Respondent, C. D. & Co., Limited, per _____
 To the Applicant, A. B., and
 To the Respondents
 (among them)

Page 19

Abolition of the Appellate Jurisdiction Bill (No. 100) (1909-10)
 Session (1) Proceedings (2) Proceedings (3)

Notes on the Bill (No. 100) (1909-10)

Notes on the Bill (No. 100) (1909-10)

Take Notice —

That the respondent, C. D. & Co., Limited, has applied to the Court for an order that the applicant, who is the respondent, be added as respondent to this application, and that the hearing of this application be adjourned to the day of the month of the year 1909.

And the respondent, C. D. & Co., Limited, has applied to the Court for an order that the applicant, who is the respondent, be added as respondent to this application, and that the hearing of this application be adjourned to the day of the month of the year 1909.

Dated this day of

(Signed) C. D. & Co., Limited

By

Secretary

[Or

Solicitor for the respondent,
 C. D. & Co., Limited]

To the Registrar of the Court,

Page 20

Order of the Court

Notes on the Bill (No. 100) (1909-10)

It is this day ordered on the application of the respondent, C. D. & Co., Limited, that the applicant, who is the respondent, be added as respondent to this application, and that the hearing of this application be adjourned to the day of the month of the year 1909.

Dated this day of

Registrar

Form 21

Notice to Applicant of the Appointment of Arbitrator of the Board
Revs. the Application for Compensation

Taxi Number

That by order dated the _____ day of _____ 19____ at _____ it was ordered
 on the application of the respondent _____ that _____ copy
 of the order be served upon the _____ of
 the applicant as provided in the _____ and that the hearing of this
 arbitration be adjourned to the _____ day of _____ at
 _____ in the _____ room.

Dated this _____ day of _____

Per _____

to the Applicant

and

The Respondent

at _____

Form 22

Notice to Applicant of the Appointment of Arbitrator of the Board
Revs. the Application for Compensation

Taxi Number

That by order dated the _____ day of _____ 19____ at _____ it was ordered
 on the application of the respondent _____ that _____ copy
 of the order be served upon the _____ of
 the applicant as provided in the _____ and that the hearing of this
 arbitration be adjourned to the _____ day of _____ at
 _____ in the _____ room.

That is to say—

That the order of the Board of Arbitration of the _____ day of _____ 19____
 in the _____ case of the _____ respondent _____ of the _____
 copy of the order be served upon the _____ of the _____
 of the applicant as provided in the _____ and that the hearing of this
 arbitration be adjourned to the _____ day of _____ at
 _____ in the _____ room.

And that the order of the Board of Arbitration of the _____ day of _____ 19____
 in the _____ case of the _____ respondent _____ of the _____
 copy of the order be served upon the _____ of the _____
 of the applicant as provided in the _____ and that the hearing of this
 arbitration be adjourned to the _____ day of _____ at
 _____ in the _____ room.

And that the order of the Board of Arbitration of the _____ day of _____ 19____
 in the _____ case of the _____ respondent _____ of the _____
 copy of the order be served upon the _____ of the _____
 of the applicant as provided in the _____ and that the hearing of this
 arbitration be adjourned to the _____ day of _____ at
 _____ in the _____ room.

Such answer, together with a copy thereof for the judge of arbitration,
 and a copy to the applicant and for each of the other respondents, must be
 filed with me ten clear days at least before the _____ day of _____

If no answer is filed, and subject to such an answer, if any, the applicant's particular and joint liability to pay compensation will be taken to be admitted.

Dated this _____ day of _____
 To _____
 of _____

By _____

FOOTNOTES

Notes by the respondent to Plaintiff's Petition

1. Not to be payable by the respondent to the plaintiff.

2. The respondent is not liable to the plaintiff.

To Mr. _____ of _____ (with a full description)

Take Notice That A.B. _____ of, et al., _____, has filed a request for arbitration (Exhibit A) whereby the plaintiff has claimed the amount of compensation payable by the respondent, C.D. & Co., Limited, _____ to the said A.B. _____ in respect of personal injuries caused to the said A.B. _____ by accident arising out of and in the course of his employment.

That B.P. _____ of _____ has filed a request for arbitration (Exhibit B) whereby the plaintiff has claimed the amount of compensation payable to the dependants of A.B. _____ deceased in respect of the injury caused to the said dependant by accident out of and in the course of his employment which resulted from injury caused to the said A.B. _____ by accident arising out of and in the course of his employment.

3. As the respondent is not liable to the plaintiff, it is not liable to pay the plaintiff.

The respondent, C.D. & Co., Limited, _____ claims to be indemnified by you against their liability to pay such compensation on the ground that at the time of the injury in respect of which compensation is claimed the said A.B. _____ was not immediately employed by the said C.D. & Co., Limited, _____ but was employed by you in the execution of work undertaken by the said C.D. & Co., Limited, _____ in respect of which the said C.D. & Co., Limited, _____ has contracted with you for the execution thereof by or under you.

On the ground that the majority of the compensation claimed was earned under contract of service with the defendant, you put *ad id*, if so, as the person who has given consent in respect of the liability of the contract of the ship "_____".

4. The plaintiff is not liable.

For a case of injury at work. The respondent, C. D. & Co., Limited, claim to be entitled to contribution from you in respect of the compensation claimed from them on the ground that the disease mentioned in the applicant's particular of disability is to be contracted by a gradual process and that respondent was employed by you during the 12 months previous to the date of disablement or suspension in the employment to the nature of which the disease was due to.

And respondent that it is necessary to deposit the applicant's claim against the respondent, C. D. & Co., Limited, or your liability to the respondent, or in respect of the contribution payable at the time and place mentioned in the notice of appeal of which the case is appealed.

In default of your appearance you will be deemed to admit the validity of an award made in the said arbitration in any matter which the judge or arbitrator has jurisdiction to decide in such arbitration between the applicant and the respondent, C. D. & Co., Limited, whether such award is made in respect of other or other and your own liability to indemnify the said C. D. & Co., Limited, or to contribute to the compensation claimed.

Dated this _____ day of _____

(Signed) _____ C. D. & Co., Limited,

By _____

Secretary

of _____

Solicitor for the Respondent,
C. D. & Co., Limited.

1907

1907

Now *For a case of injury at work.* The respondent, C. D. & Co., Limited, claim to be entitled to contribution from you in respect of the compensation claimed from them on the ground that the disease mentioned in the applicant's particular of disability is to be contracted by a gradual process and that respondent was employed by you during the 12 months previous to the date of disablement or suspension in the employment to the nature of which the disease was due to.

And respondent that it is necessary to deposit the applicant's claim against the respondent, C. D. & Co., Limited, or your liability to the respondent, or in respect of the contribution payable at the time and place mentioned in the notice of appeal of which the case is appealed.

In default of your appearance you will be deemed to admit the validity of an award made in the said arbitration in any matter which the judge or arbitrator has jurisdiction to decide in such arbitration between the applicant and the respondent, C. D. & Co., Limited, whether such award is made in respect of other or other and your own liability to indemnify the said C. D. & Co., Limited, or to contribute to the compensation claimed.

His master, solicitor for the respondent, C. D. & Co., Limited, makes my affidavit.

His master, solicitor for the respondent, C. D. & Co., Limited, makes my affidavit.

1. I order that the respondent, C'D & Co., Limited, do pay to the applicant, A.B., the sum of £_____, as compensation for personal injury caused to the said A.B. on the _____ day of _____ by accident arising out of and in the course of his employment as a workman employed by the said respondent, such weekly payments to commence on the _____ day of _____ and to continue during the total period in receipt of the said A.B. _____ for work, or until the same shall be ended, diminished, or ceased, or redeemed in accordance with the provision of the said Compensation Act.

2. And I order that the said C'D & Co., Limited, do pay to the said A.B. _____ the sum of £_____, being the amount of such weekly payments due to the said A.B. from the _____ day of _____ until the _____ day of _____, and do thereupon pay the said sum of £_____ to the said A.B. on Sunday _____ (_____ day _____).

(A) First Sunday
day or other
usual pay day
after date of
award
(B) or other
usual pay day

3. And I order that the said C'D & Co., Limited, do pay to the receiver of the Court for the use of the applicant, by _____, the respondent to the application, such costs or charges or expenses or charges payable to the applicant, to wit £_____, in the receiver's account _____ of the said Court in the County Court, and do pay to the said C'D & Co. _____ to the receiver's account _____ from the date of the certificate of the result of such taxation.

Dated this _____ day of _____

Judge of the County Court.

(In Testimony of the Court, I say:—)

He is a Judge of the County Court.

Having duly considered the entire proceedings in the above matter, my award is as follows:

That the respondent do pay to the applicant the sum of £_____ as compensation for personal injury caused to the said A.B. on the _____ day of _____ by accident arising out of and in the course of his employment as a workman employed by the said respondent.

1. I order that the respondent, A.B. & Co., Limited, do pay the sum of £_____ to the dependants of A.B., _____ late of _____ deceased, as compensation for the injury to him to such dependant from the death of the said A.B., _____, which took place on the _____ day of _____ from injury caused to the said A.B. _____ on the _____ day of _____ by accident arising out of and in the course of his employment as a workman employed by the said respondent.

column of the scale of contribution in the County Courts, and to be paid by the said C.D. & Co., Limited, to the receiver within 14 days from the date of the certificate of the result of arbitration.

[Add date and place of arbitration, and the names of the arbitrators, and the names of the arbitrators, and the names of the arbitrators.]

Dated this _____ day

And we, the Arbitrator

put in order of Arbitration, by the said C.D. & Co., Limited, to the receiver within 14 days from the date of the certificate of the result of arbitration.

[Add date and place of arbitration, and the names of the arbitrators, and the names of the arbitrators.]

Having duly considered the matter submitted to me, I do hereby make my award as follows:

[Add date and place of arbitration, and the names of the arbitrators, and the names of the arbitrators, and the names of the arbitrators.]

1. I order that the respondent, C.D. & Co., Limited, do pay the sum of £_____ for or towards the expenses of my said attendance on and the burial of A.B., £_____ paid at _____, deceased, who died on the _____ day of _____ from injuries received on the _____ day of _____ by accident at my place of employment in the course of the employment of the said A.B. in a warehouse employed by the said C.D. & Co., Limited.

2. And I declare that the persons mentioned above have agreed to share in such expenses in the following manner:

The applicant, F.F., £_____ to be paid on the _____ day of _____ due to or payable by him for or towards the expenses on the said A.B. and the respondent, G.H., £_____ due to or payable by him for or towards the expenses on the said A.B. due to him for the burial of the said A.B.

3. And I order that the respondent, C.D. & Co., Limited, do pay the said sum of £_____ to the receiver of the County Court within 14 days from the date of the award and certificate of the arbitrators, to be apportioned between and paid to the said F.F. and G.H. in proportion to the amounts due to them respectively as above.

4. And I order that the said C.D. & Co., Limited, do pay to the receiver of the County Court the costs of the applicant, F.F., and the respondent, G.H., then to be paid as set out and made to the arbitration, such costs, in default of agreement between the parties as to the amount thereof, to be taxed by the receiver under column _____ of the scale of costs in use in the County Courts, and to be paid by the said C.D. & Co., Limited, to the receiver within 14 days from the date of the certificate of the result of such taxation.

Dated this _____ day of _____

And we, the Arbitrator

[Note: The above forms will serve as guides for framing awards in other cases of arbitration.]

Form 25

None of these issues, which should be handled

In the Count, Count of

¹ *Heute hat es sich schon gut* (1991).

TAKE NOTICE that the poles of the stand will be in the pond as indicated in the above-mentioned letter at about the location shown on the plan of the lot at the head of the pond, and that if a person should be present at the location at the place and time aforesaid, he will be ordered with force and procedure, to remove the poles to the right place.

You may obtain a copy of the application information in other and upon proper payment of the cost of photocopy.

[illegible]

16.5111

but the *Alpina* is not a good *Alpina* either.

Page 12

Application to the Court for Declaration of Surplus

It is not possible to be both a socialist and a capitalist.

In the event, 1 copy of _____ book is at _____

The Woodmen Company report that there is no need to

'I like you.'

[illegible]

The record on which the application is made, and set forth in the affidavit of _____, and herewith for will be given in evidence on the hearing of the application.

Dated this _____ day of _____

(Signed)

* Name and Indus. of Applicant or Applicant's Solicitor

Form 27

*Order for Compensation**[Not to be printed, but to be read out Proceed 111]*

In the County Court of _____ holden at
 The Woolmen's Compensation Act, 1900. Section 11
 The Ship _____

I the undersigned _____ of _____
 hereby undertake to make by an order which may hereafter be made as to
 damages, in case any person affected by the order to be made on my
 application for the detention of the ship _____ shall
 sustain any damages by reason of such order which I ought to pay.
 Dated this _____ day of _____

(Signed)

Superintendent of Customs _____

*[To be offered in pursuance of the order to be made by the Judge when
 the order is made.]*

Form 28

Order for Detention of Ship

In the County Court of _____ holden at
 The Woolmen's Compensation Act, 1900.
 The Ship _____

Whereas it is alleged that the owner of the ship _____ is liable
 as such owner to pay compensation in respect of personal injury, by
 accident arising out of and in the course of his employment caused to
 _____ of _____ in the port or harbour of _____

And that the said ship has been found in the port or near or
 within three miles of the coast of the said _____

And whereas it has been shown to me the application of _____
 of _____ who claims compensation in respect of such
 injury, that the owner of the said ship is probably liable as such to pay
 such compensation, and that none of the owner reside in the United
 Kingdom.

[And whereas the said _____ has filed an
 undertaking to make by an order which may hereafter be made as to
 damages, in case any person affected by the order shall sustain any
 damages by reason of the order which the said _____ ought to pay.]

Now I do hereby make this order directed to you, the Chief Officer of
 Customs at _____ or other officer named by the Judge,
 requiring you to detain the said ship until such time as the owner, agent,
 master, or consignee thereof have paid compensation in respect of the said
 injury, or have given security in the sum of £ _____ to be approved
 by the Judge, to abide the event of any proceedings that may be instituted
 to recover such compensation, and to pay such compensation and costs as
 may be awarded thereon, or until the said ship shall be otherwise released
 by due course of law.

Dated this _____ day of _____

Judge.

To the Chief Officer of Customs at _____
[or other officer named by the Judge.]

Form 29

Order of Court

[Not to be used for orders made by the District Judge]

In the County Court of _____

The Workman's Compensation Act, 1906.

"The Ship"

Whereas it is alleged that the owner of the ship _____ is liable to the workman for personal injury by accident arising out of and in the course of his employment in or about the ship _____

And whereas the judge of the County Court has made an order directed to the Clerk of the County Court _____ to cause _____ to pay to the workman _____ the sum of £ _____ in respect of the said injury, and to give to the workman _____ the sum of £ _____ to be applied to the said workman the cost of any proceedings that may be instituted to recover such compensation, and to pay such compensation and costs to be awarded the workman until the said ship _____ shall be otherwise released by due course of law.

Now, then, for as much as the said order is a description of a judgment and is a judgment in respect of the jurisdiction of this Court, or of any other competent Court in the land or abroad in which any proceedings may be instituted to recover such compensation, and consent that if the owner, agent, partner, or command of the said ship shall not pay all such compensation and costs to be awarded the workman within _____ months from the date of the said order, and administration, good and lawful, to be made by the _____ pounds.

Section 46 of Statute

The said order is directed to the Clerk _____

and _____

the master, the _____ of _____

19 _____

Before me _____

Deputy _____

at _____ the County Court nominated _____

Form 30

Order of Court

In the County Court of _____

The Workman's Compensation Act, 1906.

"The Ship"

As it is alleged that the _____ is liable to the workman _____ now under contract by virtue of an order made on the _____ day of _____ upon the payment of £ _____ and expenses attending the said order.

Dated this _____ day of _____

Judge

To the Clerk of the County Court _____
[or other officer named in the order for delivery]

FORM 308a

*Solicitor's Undertaking to pay Security.**Not to be printed, but to be used as a Preamble.*

In the County Court of _____ holden at _____
 The Workmen's Compensation Act, 1906
 The Ship "

Whereas it is alleged that the owner of the ship " " are
 liable as such owner to pay compensation in respect of personal injury by
 accident arising out of and in the course of his employment caused to
 of _____ in the port or harbour of _____

Now, therefore, I, *L. M.*, of _____ (at _____) solicitor for
 the owner, consent, in consideration of the said ship being impleaded
 within _____ days on the date hereof to put in or pay _____ pounds, in the
 sum of £ _____, to be assessed by the judge, to abide the result of any
 proceedings that may be instituted to recover such compensation, and to
 pay such compensation and costs as may be awarded thereon.

Dated this _____ day of _____

(Signed) *L. M.*

Foot a 31

Apparatus for Discharge of Ship by Express
Chambers, Inc.

Not to be printed, but to be used as a Preamble.

In the County Court of _____ holden at _____
 The Shipowner's Notice (Remedies) Act, 1906
 The Workmen's Compensation Act, 1906
 The Ship "

Applicant hereby made on behalf of
 of _____
 who alleges -

1. That on the _____ day of _____ personal injury by accident
 arising out of and in the course of his employment was caused to
 of _____ in the port or harbour of _____ and

2. That the applicant as the employer of the said _____ has paid
 compensation or has had a claim for compensation made on him in respect
 of such injury under the Workmen's Compensation Act, 1906, and

3. That the applicant will become entitled to be indemnified
 under that Act by the owner of the ship " " on the ground that
 the said injury was caused by the said ship or sustained on or about
 the said ship, in consequence of the wrongful act, neglect, or default of the
 owners of the said ship, or the masters or officers or crew thereof, or of
 some other person in the employment of the owners of the said ship, or of
 some defect in the said ship or its apparatus or equipment, and

4. That the said ship has been found in the port (or river) of _____
 or within three miles of the coast of England], and

[illegible]

Number of _____ day of _____

$$\{ \gamma_1, \dots, \gamma_l \}$$
[illegible][illegible]

1. That the said ship has been found in the port of the town
for within three miles of the coast of the land.

[And whereas the said _____ has filed an undertaking to abide by my order which my intention is made as to damages, in case any person affected by this order shall sustain any damages by reason of this order which the said _____ ought to pay]

34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 86

Now I do hereby issue this order directed to you, the Chief Officer of Customs at [for other officer named for the judge], requiring you to detain the said ship until such time as the owner, agent, master, or consignee thereof have indemnified the said [or paid compensation in respect of the said injury, or have given security in the sum of £ [to be approved by the judge, to abide the event of any proceedings that may be instituted in respect of the said injury, or to recover such indemnity, and to pay such compensation, indemnity, and costs as may be awarded thereon, or until the said ship shall be otherwise released by due course of law]

Dated this [] day of []

Judge

To the Chief Officer of Customs at [for other officer named for the judge]

Form VI

Warrant by Court of Magistrates, or on Order of Detention made on Application of Employer claiming Indemnity

Not to be paid but to be retained as Evidence

In the County Court of [] holden at []
The ship called [] of the []
The Workmen Compensation Act, 1906.
The Ship is []

Where it is alleged []

1. That on the [] day of [] personal injury by accident arising out of and in the course of his employment was caused to [] of [] in the port for harboured

and

2. That [] of [] as the employer of the said [] has paid compensation, or has had a claim for compensation made on him in respect of the said injury under the Workmen's Compensation Act, 1906, and

3. That the said [] or will become entitled to be indemnified under that Act by the owners of the said ship [] on the ground that the said injury was caused by the said ship, or sustained on or about the said ship in consequence of the wrongful act, neglect, or default of the owners of the said ship, or the master or officers or crew thereof, or of some other person in the employment of the owners of the said ship, or of some defect in the said ship or its apparel or equipment

And whereas the judge of this Court has issued an order directed to the Chief Officer of Customs at [for other officer named for the judge], requiring him to detain the said ship until such time as the owner, agent, master, or consignee thereof have indemnified the said [or paid compensation in respect of the said injury, or have given security in the sum of £ [to be approved by the judge, to abide the event of any proceedings that may be instituted in respect of the said injury, or to recover such indemnity, and to pay such compensation, indemnity, and costs as may be awarded thereon, or until the said ship shall be otherwise released by due course of law]

Now, therefore, *we do hereby certify*, *on the expense of ourselves jointly and severally*, about one-third to the jurisdiction of the Court or of any other competent court in England or Ireland in which any proceedings may be initiated in respect of the said report of recovery, which unknown, and is so stated if the Court or other competent jurisdiction of the said High Court requires all such compensation, damages and costs to may be awarded thereon in connection with the said recovery, and costs of the said recovery, and damages for any loss or detriment, for a sum and costs specified

This had hereby returned to the said
and
the master, the said day of ,
19

Before me,

Rejoice

per Clerk to the Registrar nominated
[Signature attached]

FORM B

I hereby, for Application of a *Woolman*, *Section II, Paragraph 8*
[Signature of Applicant] *do hereby certify*

In the Court, Court of [Name of Court]

To the effect of the Woolmen's Compensation Act, 1906

In the matter of an Arbitration between

A.B.

of (Name of
[Address])

Applicant

and

C.D. & Co., Limited,
of (Name of
[Address])

Respondent.

Applicant hereby, made to the jurisdiction of the above named
to appoint the Arbitration on the above mentioned
matter in the place of M. [Name of Arbitrator] appointed thereon,
by reason of the death or refusal of M. [Name of Arbitrator] of the said M.

And the Applicant hereby requests that a time and place may be fixed
for the hearing of the Application

Dated this [Day] day of [Month], 19[Year]

Applicant

per

Applicant's Solicitor]

[Signature]

Form B.

* *Summons on Application for Appointment of new Arbitrator.*

(To be filled up by the Applicant.)

You are hereby summoned to attend before the judge in chambers, at _____ on the _____ day of _____ at the _____ hour of _____ in the _____ month, in the hearing of an application on the part of _____ for the appointment to the place of a new arbitrator in the above-mentioned matter in the place of Mr _____ the arbitrator appointed therein, by reason of the death (or refusal (or inability) to act) of the said Mr _____.

- And this notice, that in default of your attendance at the time and place above mentioned, the judge will on proof of the service of this summons, proceed to hear and dispose of the said application,

Dated this _____ day of _____.

To _____ Registrar

and to him (or them) Solicitor

Form Bb.

Form of Memorandum under Paragraph 9 of Schedule II.

(Not to be printed, but to be filled up as a Proceeding.)

To the Registrar of the Central Court of _____ at _____.

In the matter of the Workmen's Compensation Act, 1906, and _____

In the matter of an arbitration between _____

* A B _____ Applicant,

and _____

C D & Co., Limited,

of, etc.

Respondents,

[or, *where the matter has been decided by agreement without arbitration,*

In the matter of an Agreement between _____

A B _____

and _____

C D & Co., Limited,

of, etc., _____]

Be it now related, that on the _____ day of _____ personal injury occurred to the above-named A B, by accident arising out of and in the course of his employment.

And that on the _____ day of _____ the following agreement was come to by and between the said A B _____ and the said C D & Co., Limited, that is to say:

[or And that on the _____ day of _____ the following decision was given by a committee representative of the said C D & Co., Limited, and then voluntarily having power to settle matters under the above-mentioned Act in the case of the said C D & Co., Limited, and their workmen, that is to say:]

[or And that on the _____ day of _____ the following award was made and given by me, the undersigned _____, being an arbitrator agreed on by the said A B _____ and the said C D & Co., Limited, that is to say:]

[Here set out copy of agreement, decision, or award.]

[or, where death resulted from the accident,

* _____

The respondent stated that on the date of the personal injury was caused to A.B. the respondent, by accident, did not intend to cause injury to the respondent, and that on the date of the collision A.B. did not know the result of such injury.

[illegible][illegible]

As for the important role of the media in the approach to reporting the new situation in the country, it should be noted that the media is a very important element in the approach to the situation in the country.

You're better equipped to lead the community, you want to bring up the new road which will show everyone the way.

1911.7 1911.7 1911.7

“ ” “ ”

[illegible]

It has to be noted that, in the above, the \mathcal{H}_∞ norm of the closed-loop system is not used as the performance index. This is because the \mathcal{H}_∞ norm is not a linear functional of the system matrices. In this paper, the \mathcal{H}_∞ norm is used only to provide a qualitative comparison of the performance of the closed-loop system.

In the case of a child, the mother is the primary caregiver.

Since \mathcal{M} is a \mathcal{C}^* -module, it is good to let \mathcal{M} be a \mathcal{C}^* -bimodule over the multiplier algebra.

101 7

$$Z_{\text{eff}} = 1 + W_{\text{eff}} = 1 + \frac{1}{2} \frac{f^2}{m^2} \frac{m^2}{\Lambda^2} = 1 + \frac{1}{2} \frac{f^2}{\Lambda^2} \frac{m^2}{\Lambda^2}.$$

In the context, it appears that the following

11 12 13 14 15

Therefore, the diagonal column, ϕ , of \mathbf{A} has been computed by the column reduction.

Such an interpretation of the results is

I have the honor to permit you to receive my information from the date whether you please are genuine or the more ordinary, or whether you disapprove, and it seems of particular importance to be recorded, and if so, on what ground.

If you do not inform me within ten days that you dispute the genuineness of the memorandum or object to its being recorded, it may be recorded without further inquiry, and will be enforceable accordingly.

If *you* dispute its genuineness or object to its being recorded, it will not be recorded, except with your consent in writing, or by order of the judge of this Court.

Dated this _____ day of _____

Registrar

To _____

Form 14

- *Notice of dispute of Memorandum, or of its being recorded, or of its being properly entered on the Proceedings.*

In the County Court of _____

Memorandum

TAK Notice, that the undersigned **CLERK** of _____ do hereby dispute the genuineness of the memorandum entered for registration in the above-mentioned matter in the following particulars:

here state particulars

FOR **THE** Notice, that the undersigned **CLERK** of _____ do hereby object to the memorandum entered for registration in the above-mentioned matter being recorded on the following ground:

here state ground _____

Dated this _____ day of _____

CLERK & Co., Limited,

by _____

Solicitor.

Substituted for **CLERK** & Co., Limited

To _____

The Registrar

Form 15

Notice of Memorandum, or of its being recorded, or of its being properly entered on the Proceedings.

Memorandum

TAK Notice, that the genuineness of the memorandum in the above-mentioned matter left with me for registration is disputed by _____ of _____ a party affected by such memorandum, in the following particulars:

here state particulars and grounds

_____ that _____ of _____ a party interested in the memorandum in the above-mentioned matter left with me for registration is disputed by _____ of _____ a party affected by such memorandum, in the following particulars:

here state grounds

The memorandum will therefore not be recorded, except with the consent in writing of the said _____, or by order of the judge of this Court.

Dated this _____ day of _____

Registrar

To _____

AND FURTHER TAKE NOTICE, that by order of the judge you are hereby summoned to attend before the judge at a Court to be holden at _____ on _____ the _____ day of _____ at the hour of _____ in the _____ noon, when the matter will be inquired into by the judge.

And that if you do not attend either in person or by your solicitor on the day and at the hour above mentioned in this order will be made and proceedings taken at the judge's chambers and at his cost and expence.

Dated this _____ day of _____

Respectfully,

To (a) your solicitor (b) _____

Form 11

Application to the Judge at Chambers for an Order for the Removal of the Record of the Proceedings in the County Court of _____

In the County Court of _____ holden at _____

Between _____

For Notice that I intend to apply to the judge at _____ on _____ the _____ day of _____ at the hour of _____ in the _____ noon, for an order for the removal from the record of the record of the proceedings of the agreement in the above-mentioned matter which was recorded on the _____ day of _____, pursuant to paragraph 9 of the second schedule to the above-mentioned Act, on the ground that the said agreement was obtained by fraud or undue influence or improper means, and for costs and disbursements, and for costs and disbursements.

Dated this _____ day of _____

Applicant,

or Applicant's Solicitor

For the Registrar of the Court

and to _____

And to _____

and to _____ Solicitor

Form 12

Notice to Parties of an Application for an Order for Removal of Record of the Proceedings in the County Court of _____

In the County Court of _____ holden at _____

Between _____

Whereas it has been made by application to the judge that an inquiry should be held as to the removal from the record of the record of the proceedings of the agreement in the above-mentioned matter which was recorded on the _____ day of _____, pursuant to paragraph 9 of the second schedule to the above-mentioned Act, on the ground that the said agreement was obtained by fraud or undue influence or improper means,

Form 15

*Application for Summons to Medical Referee as Assessor**[Not to be printed, but to be used as a Precedent.]**Medical Referee's Request for Arbitration*

The applicant or respondent applies to the judge to summon a medical referee to sit with him as an assessor on the ground that questions are likely to arise in the arbitration as to the condition of the applicant or his fitness for employment or *as to costs payable*, and that it is desirable that the judge should have the assistance of a medical referee in the determination of such question.

Dated this day of

To the Registrar
of the Court

(Signed) A. G. ,

Applicant

or
Solicitor for the Applicant
or as to costs payable

I consent to a medical referee being summoned to sit with me as an assessor

Judge

Form 16

*Notice of Referee to Summons Medical Referee as Assessor**Medical Referee's Request for Arbitration*

I hereby give you notice that in Honour the Judge of the Court has directed me to inform you that your application for a medical referee to be summoned to sit with the judge as an assessor is allowed, the judge being of opinion that the summoning of a medical referee is unnecessary.

Dated this day of

Registrar

To
The applicant
or as to costs

Form 17

*Summons to Medical Referee to sit as Assessor**Medical Referee's Request for Arbitration*

The day of

Sir,

You are hereby summoned to attend and sit with the Judge as an assessor at the court-house situate at the day of at the hour of in the noon

I am, Sir,

Your obedient servant,

To

of

Registrar

Power 45

Application by Between's Child, B, to the said S. for the 1st
Paragraph 15

Not to be paid by the said S. for the 1st

In the matter of the said B. for the 1st

In the matter of the Workmen's Compensation Act, 1906

In the matter of the Workmen's Compensation Act, 1906

of the said C. D. & Co., Limited, of the

for the said B. for the 1st

In the matter of the Workmen's Compensation Act, 1906

of the said C. D. & Co., Limited, of the

of the said C. D. & Co., Limited, of the

Applied,

C. D. & Co., Limited, of the

of the said C. D. & Co., Limited, of the

Reported

for the said B. for the 1st

In the matter of the Workmen's Compensation Act, 1906

of the said C. D. & Co., Limited, of the

of the said C. D. & Co., Limited, of the

Applied by the said B. for the 1st

In the matter of the Workmen's Compensation Act, 1906

for the said B. for the 1st

1. An application under the said Act, for payment between the above-mentioned AB and the above-mentioned CD & Co., Limited, of the

for the said B. for the 1st

C. D. & Co., Limited, of the

2. The said payment of the said

is

3. A question has arisen between the said AB and the said CD & Co., Limited, as to the condition for payment for the said AB

said A B is due to the accident, and no agreement can be entered into between the said C D & Co., Limited, and the said A B, with reference to such question or questions."

1. The said A B has submitted himself for examination by a medical practitioner provided to the said C D & Co., Limited, and has been examined by a medical practitioner selected by him (the said A B) has submitted himself for examination by a medical practitioner provided by the said C D & Co., Limited, and has not been examined by a medical practitioner selected by himself, and a copy of the report of the said practitioner is a copy of the reports of the said practitioners are annexed to this application.

2. The applicant respects that in order not to make reference to a medical referee for his certificate as to the condition of the said A B and his fitness for employment, providing it necessary the kind of employment for which he is fit or for his certificate whether or to what extent the incapacity of the said A B is due to the accident, or for his certificate as to the condition of the said A B and his fitness for employment, providing it necessary the kind of employment for which he is fit, and as to whether or to what extent the incapacity of the said A B is due to the accident.

Dated this day of ,
(Signed)

Applicant
or Applicant's Agent
C D & Co., Limited,
by Secretary,
and Agent for C D & Co., Limited.

To the Referee

FOOTNOTES

Order of Referee, Secretary, and Referee

In the presence of to be read
The following Application:

On the application of A B of and C D & Co., Limited, of a copy of which I have received, I hereby appoint Mr. of one of the medical referees appointed by the Secretary of State for the purpose of the Workmen's Compensation Act, 1906, to examine the said of and his fitness for employment, providing it necessary the kind of employment for which he is fit or his certificate whether or to what extent the incapacity of the said is due to the accident, or for his certificate as to the condition of the said and his fitness for employment, providing it necessary the kind of employment for which he is fit, and as to whether or to what extent the incapacity of the said is due to the accident.

Copy of the reports of the medical practitioners to whom the said has been examined are hereto annexed.

The said who is now at , has been directed to submit himself for examination by the referee.

I am satisfied that the medical certificate was obtained for the purpose of being examined, and hereby certify that and say the referee for compensation is not time and place bound by it, but the referee for the medical certificate is not bound by it for the purpose of being examined.

The referee is required to be satisfied by the certificate of the doctor at the County Court Office, and is not bound by it for the purpose of being examined.

Dated this _____ day of _____, 1907.

W. H. H. H. H.

Form 14

Order on Appeal (Regulation 14) of the County Court, for the purpose of being examined.

In the County Court of _____, held on _____, 1907.

At _____, in the County Court of _____.

That I, _____, do hereby certify that the medical certificate of the medical referee appointed by the County Court of _____ for the purpose of the Workmen's Compensation Act, 1906, is not to be taken into account in the County Court of _____ for the purpose of being examined.

You are hereby required to be satisfied by the certificate of the medical referee appointed by the County Court of _____ for the purpose of the Workmen's Compensation Act, 1906, is not to be taken into account in the County Court of _____ for the purpose of being examined.

Dated this _____ day of _____, 1907.

W. H. H. H. H.

Form 15

Notice to Parties of Court of the Medical Referee.

In the County Court of _____, held on _____, 1907.

That I, _____, do hereby certify that the medical referee appointed in this matter, and that you are to be satisfied by the same during office hours at my office, at _____, and may on request and at your own cost be furnished with one or more copies thereof.

Dated this _____ day of _____, 1907.

To _____, and _____, the parties.

Form 52

Notice of Application for Suspension of Rules of Court relating to taking of possible Proceedings in relation to Compensation payable to the of
Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16, of

Not to be printed, if taking of Rules Proceedings

In the County Court of _____

In the matter of the Workmen's Compensation Act, 1906.

In the matter of a claim for compensation made by A.B.
 of _____

against C.D. & Co., Limited, of _____

In the matter of an arbitration between

A.B.,

of _____

(the applicant)

and

C.D. & Co., Limited,

of _____

(the respondent)

[to be printed.]

for, where application is made either orally or by post, to be printed.

In the matter of an agreement for a decision of an arbitrator or a certificate recorded in the above mentioned matter as to the weekly payment payable to A.B. of _____
 by C.D. & Co., Limited, of _____

That I, the undersigned, do hereby certify that I intend to apply to the judge or the arbitrator at the hour of _____ on the _____ day of _____ at the hour of _____ in the _____ Court on behalf of Messrs. C.D. & Co., Limited, of _____, that in order to pending your right to compensation in the above-mentioned matter and to take or procure an proceeding under the above-mentioned Act in relation to compensation for a pending your right to weekly payments in the above-mentioned matter, on the ground that you refuse to submit your self to medical examination as required by me or by the said C.D. & Co., Limited, in accordance with paragraph 1, or paragraph 11, of the first schedule to the Act, or that you obstruct the medical examination required by me or by the said C.D. & Co., Limited, in accordance with paragraph 1, or paragraph 11, of the first schedule to the Act, or on the ground that you refuse to submit your self for examination by a medical referee as ordered under paragraph 1 of the first schedule to the Act, or that you obstruct the examination by a medical referee ordered under paragraph 15 of the first schedule to the Act, and for consequential directions, and for costs.

Dated this _____ day of _____

To A.B., of _____
 and to Messrs. _____
 his Solicitors

(Signed) _____ C.D. & Co., Limited,
 by _____ Secretary,
 { to _____
 Solicitors for C.D. & Co., Limited]

• *Workmen's Compensation Rules, 1907* 823

Form 53

Proceedings Pursuant to the Workmen's Compensation Act, 1906 •

[The following form is to be filled up by the Employer]

In the Court of Law of _____ holder of _____

In the matter of the Workmen's Compensation Act, 1906,

and

In the matter of an Arbitration between

A B _____ of _____ and _____ of _____

C D & Co., Limited, _____ of _____ and _____ of _____

and

In the matter of an Agreement between

A B _____ of _____ and _____ of _____

C D & Co., Limited, _____ of _____ and _____ of _____

and

In the matter of the Certificate of Compensation in *State of* _____

between

A B _____ of _____ and _____ of _____

and

C D & Co., Limited, _____ of _____ and _____ of _____

(Copy to be retained by)

That Section 1 of the Workmen's Compensation Act, 1906, provides that C D & Co., Limited, _____ of _____ and _____ of _____ shall be liable to the extent of _____ of the said C D & Co., Limited, _____ of _____ and _____ of _____ in the sum of _____ (£ _____) being the sum payable by or on behalf of the said C D & Co., Limited, _____ of _____ in compensation in the above-mentioned matter.

Dated the _____ day of _____

(Signed) _____ of C D & Co., Limited, _____ of _____

by _____

Secretary,

[or _____ of _____ Solitors for C D & Co., Limited]

To the Registrar

Received the above-mentioned sum of _____

Registrar

[Date]

Clause 56

And the said Board may cause to be made any further investigation which may be required for the purpose of ascertaining the facts of the case.

And the Board may cause to be made any further investigation which may be required for the purpose of ascertaining the facts of the case.

In the event of a dispute between the Board and the employer or the workman, the Board may cause to be made any further investigation which may be required for the purpose of ascertaining the facts of the case.

In the event of a dispute between the Board and the employer or the workman, the Board may cause to be made any further investigation which may be required for the purpose of ascertaining the facts of the case.

In the event of a dispute between the Board and the employer or the workman, the Board may cause to be made any further investigation which may be required for the purpose of ascertaining the facts of the case.

And the Board may cause to be made any further investigation which may be required for the purpose of ascertaining the facts of the case.

And the Board may cause to be made any further investigation which may be required for the purpose of ascertaining the facts of the case.

And the Board may cause to be made any further investigation which may be required for the purpose of ascertaining the facts of the case.

And the Board may cause to be made any further investigation which may be required for the purpose of ascertaining the facts of the case.

And the Board may cause to be made any further investigation which may be required for the purpose of ascertaining the facts of the case.

And the Board may cause to be made any further investigation which may be required for the purpose of ascertaining the facts of the case.

And the Board may cause to be made any further investigation which may be required for the purpose of ascertaining the facts of the case.

And the Board may cause to be made any further investigation which may be required for the purpose of ascertaining the facts of the case.

Clause 57

And the Board may cause to be made any further investigation which may be required for the purpose of ascertaining the facts of the case.

In the event of a dispute between the Board and the employer or the workman, the Board may cause to be made any further investigation which may be required for the purpose of ascertaining the facts of the case.

I hereby appoint Mr. [Name] to be the referee for the purpose of the Workmen's Compensation Act, 1906, to examine the said [Name] and to report to the Board on the facts of the case.

The said [Name] has been directed to submit him self for examination by the referee.

B.E.L.

B.H.

I am satisfied that the said _____ is in a fit condition to travel for the purpose of being examined, and he has been directed to attend on the referee for examination at such time and place as may be fixed by the referee.

or The said _____ does not appear to be in a fit condition to travel for the purpose of being examined.

The referee is requested to forward his certificate to the Registrar at the County Court Office situated at _____ on or before the _____ day of _____, specifying therein the nature of the incapacity of the said _____ and whether the same is total or partial.

Dated this _____ day of _____

Judge of the Registrar

FOURTH

[To be printed on each side of copy]

Certificate of Incapacity

TO BE CAREFULLY PRESERVED

NOTE -- THIS CERTIFICATE IS NOT VALID UNLESS SIGNED BY A JUDGE

NOT VALID UNLESS

In the County Court of _____

(Holding of a Trial and Memorandum of Certificate)

This is to certify that A.B. _____ (title of holder and an exception, is entitled to a weekly payment of _____ from the _____ association of employers)

as compensation payable to the said A.B. _____ in respect of personal injury caused to him by accident and not caused by the road of his employment, such weekly payment to continue during the total or partial incapacity of the said A.B. _____ (to read)

And that the description of the said A.B. _____ and his incapacity for work, as certified by the medical referee appointed in the matter, are as follows:--

Age,

Height,

Build,

Eyes,

Nature of incapacity,

To describe nature of incapacity, and whether the same is total or partial, as in certificate of medical referee.

Dated this _____ day of _____

Registrar

Form 60

Form of Medical Certificate to be given by a Woman residing out of the United Kingdom

(Headings in Front, Memorandum on Certificate)

I (name, address, occupation) attached out of a child (name) hereby certify that I have this day examined A B of whom I consider I believe to be the same person as A B of , described in the copy certificate of the medical referee in the above mentioned letter, dated the day of and in the certificate of identity dated the day of produced to me by the said A B and that in my opinion the particulars of the said A B resulting from the inquiries made in the said certificate of the medical referee still continue

Dated this day of

(Signature)

Declared at this day of in the presence of the said A B, the copy of the certificate of the medical referee and the certificate of identity above mentioned being at the same time produced.

Before me

Signature and description of person before whom the declaration is made

Form 61

Declaration of Identity by Woman residing out of the United Kingdom

(Headings in Front, Memorandum on Certificate)

I, A B of hereby declare that I am the same person as A B of described in the copy of the certificate of the medical referee in the above mentioned matter, dated the day of , now produced by me and in the certificate of identity, dated the day of , now produced to me, and the same person as A B of described in the certificate of identity issued by the said in my presence on the day of , and now produced to me

(Signature)

A B,

Declared at this day of , the certificates above mentioned being at the same time produced

Before me

(Signature and description of person before whom the declaration is made)

For 1907

Received of the undersigned the sum of _____ Rupees

Rs. _____

Sh

I hereby certify that the above sum of _____ Rupees is the amount of the compensation payable to the undersigned in respect of the loss of _____

Rs. _____

For 1907

Received of the undersigned the sum of _____ Rupees

Rs. _____

Sh

I hereby certify that the above sum of _____ Rupees is the amount of the compensation payable to the undersigned in respect of the loss of _____

For 1907

Received of the undersigned the sum of _____ Rupees

Rs. _____

I hereby certify that the above sum of _____ Rupees is the amount of the compensation payable to the undersigned in respect of the loss of _____

To the undersigned

of the _____

Sh

I hereby certify that the above sum of _____ Rupees is the amount of the compensation payable to the undersigned in respect of the loss of _____

For 1907

Received of the undersigned the sum of _____ Rupees

Rs. _____

I hereby certify that the above sum of _____ Rupees is the amount of the compensation payable to the undersigned in respect of the loss of _____

And I hereby certify that the above sum of _____ Rupees is the amount of the compensation payable to the undersigned in respect of the loss of _____

Dated this _____ day of _____

By _____

To (name and address of employer) _____

Form 64

Notice of Application for Determination of Amount of Costs under
Section 11, Practice Act 13

(Not to be printed but to be read or a Precourt)

In the County Court of helden at

Held at as a Court of Sessions for

I, the undersigned, do hereby certify that I intend to apply to the judge of the County Court of at the hour of on the day of to determine the amount of costs to be paid to me as defendant in said cause for you A B in the above-mentioned matter and for an order declaring that I am entitled to a lien for such amount on or to deduct such amount from the sum payable in compensation to you the said A B in the above-mentioned matter and for consequential directions

Dated this day of

Applicant

To the Registrar of the Court
and to
A B
of

Form 65

Return of a Court of Sessions upon Certificate

In the County Court of helden at

Held at as a Court of Sessions for

Whereas on the day of an award was made in the above-mentioned matter by the judge of the County Court of in which you appeared, by the judge, whereon it was ordered, that and

[or Whereas on the day of a memorial was recorded in this Court of an agreement or a decision or an award, or came to [or give or made] in the above-mentioned matter, whereby it was agreed or ordered, that parts of agreement, decision, or award,

for Whereas on the _____ day of _____ a memorandum was
recorded in this Court of a written decision by the County Court of _____
to the effect that _____

1. All vectors are perpendicular to \vec{u} and \vec{v} and hence to the plane containing \vec{u} and \vec{v} .
2. All vectors are perpendicular to \vec{u} and \vec{v} and hence to the plane containing \vec{u} and \vec{v} .
3. All vectors are perpendicular to \vec{u} and \vec{v} and hence to the plane containing \vec{u} and \vec{v} .

That the said officers may in due order, both by water and by land, be able to apprehend and execute of the said warrant, *we the said Justices* do hereby authorize and empower them, whensoever they may be found, within the district of the said port, and the waters adjacent and appertaining thereto, and the land and implements of husbandry, with all the value of the pound, the sum total of the load of this warrant, to be conveyed and delivered, or stored on, in memorandum or certificate, together with the receipt of the said captain, and of all size and content, in a book made by the order of the Port of London, or of some other place, and may, besides, call of some necessary stores, food, provisions, or other necessaries of the said ship, which might be required, or what other commodity there may be sufficient to give the said captain and the crew of the said ship, victuals the same, and to pay for on bill of exchange, to the Receiver of this Court, and to pay the necessary cost thereof, and the warrant immediately up to the said book.

By the Court.

16 g-41.01

1. The Commission of the European Communities (CEC) has been established by the Treaty of Rome, signed in 1957, and is the main body responsible for the implementation of the Treaty.

And, finally, the *Journal of the American Medical Association* (JAMA) has

For the purpose of the present study, the following hypotheses were formulated:

Notes: The food and water are not to be supplied until after the end of the day previous to the day on which they were seized, unless they be of a perishable nature, at the request of the said

Appointed a _____ to the Registrar for this warrant at _____ minutes
past the hour of _____ in the _____ noon of the _____
day of _____ 19____ at the _____

5.1.3.3. *Staphylococcus aureus*

81 & 82 Vict.
c. 43, s. 133

To be embodied in a copy of the Act of 1868.

PRINTED BY THE LONDON LITHOGRAPHIC CO. LTD.

Order XXV,
Rule 17.

The fees for keeping possession of the goods and including expenses of removal, storage of goods, and all other expenses of the process of enforcement, may be recovered by the creditor from the value of the goods, to be paid by agreement in case of dispute, and the total fee does not exceed ten pence, in the value exceeding 20^s. and, in addition, for each day, until the goods are sold, the actual cost thereof.

If the debtor pays the amount to be levied, as ordered by the officer, the further bill in lieu of the entry of the bailiff, he will not be required to pay to him any further sum.

If possession is taken of the goods, and the value is paid by both parties, the fee and cost of keeping possession does not, but shall be allowed for a reasonable further time in respect of the possession.

If the goods are sold the debtor shall be liable to pay the amount of the fee as undermentioned.

If the goods are sold the following fee shall be added to the appraisement and sale, and no other:

For the appraisement, one penny for every ten shillings of the value of the goods appraised, not exceeding one shilling.

For the sale, including advertisement, cartage, and commission, one shilling for every hundred shillings of the value of the goods sold, not exceeding one shilling.

For advertising and notice paid by the debtor, or by a party not to section 11 of the Bailiff's Act, 1868, in addition to the fee as mentioned here, the same shall be added to the total paid.

When no sale takes place by reason of the execution being withdrawn, satisfied, or stopped, there may be allowed all charges actually and necessarily incurred for notices, appraisement, cartage, carting, and preparation for sale, not exceeding one shilling for every ten shillings of the value of the goods sold, if the value does not exceed ten pence, and not more than one shilling for every ten pence, if the value exceeds ten pence, and in addition may be added to the value to be paid by agreement in case of dispute, and in addition may be added to the value to be paid for advertising paid by the debtor to section 11 of the Bailiff's Act, 1868.

If the goods are removed the bailiff is required to give the debtor a written inventory of the goods removed, and to give him notice of the time when and the place where such goods will be sold, at least twenty-four hours before the time fixed for the sale.

If the goods are sold, the bailiff is required to furnish the debtor, on request, with a detailed account in writing of the sale, and of the application of the proceeds thereof.

[This form to be adapted to the circumstances of the case where necessary in order to be issued under Rule 163, paragraph (c), for costs.]

Yes, it is an old tool.

[illegible]

Now, $\mathbf{N}_{\text{opt}} = \mathbf{N}_{\text{opt}} + \mathbf{I}$ and $\mathbf{N}_{\text{opt}} = \mathbf{N}_{\text{opt}} + \mathbf{I}$ are the optimal values of the parameters \mathbf{N}_{opt} and \mathbf{N}_{opt} respectively.

We, William L. Selt, William Cecil Smyth, Robert Woodhall, Thomas C. Grazier and H. Tindal Atkinson, being the five judges of the County Courts appointed for the making of Rules under section one hundred and sixty four of the County Courts Act, 1888, having made the foregoing Rules of Court pursuant to paragraph twelve of the Second Schedule to the Workmen's Compensation Act, 1906, do hereby certify the same under our hands and submit them to the Lord Chancellor accordingly.

Wm F. Sch
H. H. am Coal Supply
R. H. and H.
T. C. Co. and Co.
H. T. and H. H. and Co.

I Allow these Rules

Lachmann C.

The 1st of June, 1907

STATUTORY RULES AND ORDERS 1908

No. 211 L. 1.

MASTER AND SERVANT

Workmen's Compensation Act 1906.

The Workmen's Compensation Rules 1908. Dated May 14 1908.

The following Rules shall have effect under the Workmen's Compensation Act 1906.

The Rules may be cited as the Workmen's Compensation Rules 1908 or each Rule may be cited as if it had been one of the Workmen's Compensation Rules 1907 herein referred to as the principal Rules and hereinafter numbered therein by the number of the Rule placed in the margin opposite such Rule.

These Rules shall come into operation on the 1st day of May one thousand nine hundred and eight.

Part I.—The Registrar's Duties as to the Application of the Rules.

1. The following paragraph shall be added to Rule 5 of the principal Rules viz.—

(1) The Registrar shall within twenty-four hours from the time of payment made pursuant to the last preceding paragraph send notice thereof to the applicant and to the other respondents if any and the employer shall not be liable to any costs otherwise than in accordance with paragraph (c) of Rule 18.

Part II.—Provisions.

Amendment 4
Rule 19

2. Paragraph 1 of Rule 19 of the principal Rules is hereby annulled and the following paragraph shall stand in lieu thereof viz—

(1) In the application of the Act and these Rules in the case of a workman disabled by or suspended on account of his having contracted any disease mentioned in section 8 of and the third schedule to the Act or in any order of the Secretary of State made under subsection 6 of the said section or disabled by or suspended on account of his having sustained any injury due to the nature of any employment specified in any such order, not being an injury by accident, or in the case of a

workman whose death has been caused by any such disease or injury as above mentioned, the following provisions shall have effect—

Act of Deceit

3. Rule 11 of the principal Rules shall be read and construed as if the words "signed by the registrar himself and were certified" were omitted therefrom. Amendment of Rule 11

Payment into Court and its Application by the Court When Applicable in case of Death—Schedule I Provisions

4. Rule 56 of the principal Rules is hereby amended, and the following Rule shall stand in lieu thereof:

"a. (1) Where any payment in the case of death is to be paid into the County Court pursuant to paragraph 5 of the first schedule to the Act, the following provisions shall have effect: Payment into court, investment, and application of payment in case of death

2. Where any money is to be paid into court under an award made by the judge or an arbitrator appointed by him, payment shall be made in accordance with the directions contained in the award. Act, Schedule 1, par. 5

(3) In any other case, payment shall be made into the court in which the memorandum of the decision, award or agreement under which the money is to be paid or the certificate under which the money is to be paid has been or is to be recorded.

(4) If there is no dispute as to the amount payable for invalid agreement or because of the reason of the disability or absence of the dependants or any of them, payment shall be made into the court in which if a valid agreement could be come to in the matter, such agreement would be recorded.

5. Where money is to be paid into court under paragraph 2 or paragraph 3 of this Rule, the employer shall lodge with the registrar a receipt in duplicate according to the form set in the Appendix and, where money is to be paid into court under paragraph 1, the employer shall lodge with the registrar a receipt in duplicate according to the form set in the Appendix. The employer shall annex to one copy of the receipt a form of receipt, and the registrar, on receipt of the sum paid in, shall sign the receipt and return the same to the employer, and the employer shall forthwith give notice to the persons interested in the sum paid in of such payment having been made.

6. On the payment of money into court, the registrar shall forthwith send by post to each of the persons appearing by the award, memorandum, certificate or receipt to be interested in such money a notice of the said payment according to the form set in the Appendix. Form 53a
Provided that in the case of infant dependants residing with their

mother or guardian it shall be sufficient to send such notice to the mother or guardian only.

(7) If all questions as to who are dependants and the amount payable to each dependant have been settled by agreement or arbitration before payment into court the sum paid into court shall be allotted between the dependants in accordance with the agreement or award and the amount allotted to each dependant shall be invested, applied or otherwise dealt with by the court for the benefit of the person entitled thereto in accordance with paragraph 5 of the first schedule to the Act.

(8) If such questions have not been settled before payment into court then—

(a) If all the persons interested in the sum paid into court agree to leave the application thereof to the court or if no question arises as to who is a dependant or as to the amount payable to any dependant or otherwise as to the application of the sum paid into court but any of the persons interested in the said sum are absent or under disability the amount paid into court shall on application by or on behalf of the persons interested therein, be invested, applied or otherwise dealt with by the court for the benefit of the persons interested therein in accordance with paragraph 5 of the first schedule to the Act.

(b) If any question arises as to who is a dependant or as to the amount payable to any dependant or otherwise as to the application of the sum paid into court such question shall be settled by the court by arbitration in accordance with these Rules and the amount allotted to each dependant shall be invested, applied, or otherwise dealt with by the court for the benefit of the person entitled thereto in accordance with paragraph 5 of the first schedule to the Act.

(9) Where any question is settled by the court by arbitration in accordance with the last preceding paragraph, an application for the investment or application of any sum allotted to any person on such arbitration may be made at any time or immediately after the hearing of the arbitration.

(10) (a) Where application is not so made, or in any other case coming within paragraph 5 of the first schedule to the Act an application for the investment or application of any sum paid into court, or of the amount allotted to any person, shall be made in court on notice in writing stating on whose behalf the application is made,

and the order which the applicant asks according to the form in the Formic Appendix.

(b) The notice shall be filed with the Registrar, and where the application is made by or on behalf of several only of the persons interested notice thereof shall be served on all other parties interested or on their solicitors, five clear days at least before the hearing of the application, unless the judge or Registrar gives leave for shorter notice.

(c) On the hearing of the application witnesses may be orally examined in the same manner as on the hearing of an action.

(d) On the hearing of the application the judge may, after making or directing such inquiries as to the dependents and on such evidence of title and identity as he may think necessary, make such order under paragraph 5 of the first schedule to the Act and this rule as he may think fit.

(e) The provisions of the Act and these Rules as to the costs of an arbitration shall apply to any such application.

(f) An employer paying money into court under this rule shall not be liable to any costs incurred by any person interested in such money after the receipt of notice of payment into court, but the judge may in his discretion order such employer to pay the costs of any such person properly incurred before the receipt of such notice.

(g) The order for the investment or application of money paid into court shall reserve liberty to the parties interested to apply to the court as they may be advised.

(h) Where any sum allotted to any person under paragraph 5 of the first schedule to the Act or this rule is ordered to be paid out to or applied for the benefit of the person entitled thereto by weekly or other periodical payments such payments may be made to the person entitled to receive the same either at the office of the Registrar or on the written request of such person by circular cheque or Post Office order addressed to such person and forwarded by registered post letter, payment by post being in all cases at the cost and risk of the person requesting the same.

Proceedings where Workmen receive weekly payments, orders to cause to be done in the First Schedule Schedule I Part 1, para 118

5 Paragraphs 1 to 7 of Rule 101 of the principal Rules and Amendment of Rule 101 and Forms 56, 57, and 58, are hereby amended, and the following paragraphs and Forms 56A, 57A, and 58A in the Appendix shall stand in lieu thereof —

Form 56A

(a) (i) The application shall be made on notice in writing according to the form in the Appendix which shall be filed with the registrar and shall be accompanied by a report of a medical practitioner selected by the workman setting out the nature of the incapacity alleged to be the result of the injury and a copy of the application and of the report shall be served on the employer or his solicitor in accordance with Rule 18, and the applicant shall file a copy of the application and of the report for the use of the medical referee.

(ii) The employer may on being served with notice of the application require the workman to submit himself for examination by a medical practitioner provided and paid by the employer in accordance with paragraph 11 of the first schedule to the Act, and if the employer requires the workman to submit himself for such examination he shall before or at the hearing of the application furnish the workman with a copy of the report of that practitioner as to the workman's condition and file a copy of the report for the use of the medical referee.

(iii) The workman and the employer respectively may before or at the hearing of the application submit to the registrar such statements in writing as they may think fit with copies of such statements for the use of the medical referee.

Form 57A

(iv) On the hearing of the application the registrar on being satisfied that the applicant has a bona fide intention of ceasing to reside in the United Kingdom shall make an order referring the question to a medical referee, and if he is not so satisfied he may refuse to make an order, but in that case he shall if so requested by the applicant refer the matter to the judge who may make such order or give such directions as he may think fit.

Form 58

(v) If the registrar or the judge make an order referring the question to a medical referee he shall also make an order directing the workman to submit himself for examination by the medical referee, subject to and in accordance with any regulations made by the Secretary of State, and the provisions of paragraphs 3 to 6 of Rule 54 shall with the necessary modifications apply.

(vi) The registrar shall with the order of reference forward to the medical referee copies of any statements submitted to him by either party.

Form 51

(vii) The medical referee shall forward his certificate in the matter to the registrar by registered post specifying therein the nature of the incapacity of the workman resulting from the injury and whether such incapacity is likely to be of a permanent nature, and the registrar shall thereupon proceed in accordance with paragraph 8 of Rule 51.

APPENDIX

Form 101
Schedule 1 to Form 101-100

Form 101
This form to be filled in by the Employer or Secretary of the Employer, and
to be submitted to the Insurance Commissioner
in accordance with the provisions of the Act.
It is to be completed by the Employer or Secretary of the Employer.

In the month of the Workmen's Compensation Act, 1906
the amount of compensation payable to the injured workman or his dependants
is £100.
The total sum of the compensation payable to the injured workman or his dependants
is £100.

The total sum of the compensation payable to the injured workman or his dependants
is £100.
The total sum of the compensation payable to the injured workman or his dependants
is £100.

The total sum of the compensation payable to the injured workman or his dependants
is £100.
The total sum of the compensation payable to the injured workman or his dependants
is £100.
The total sum of the compensation payable to the injured workman or his dependants
is £100.

Such is the sum of the compensation payable to the injured workman or his dependants.

Dated this day of 1906
Signed by the Employer or Secretary of the Employer

To the Registrar
Received the sum of money of £100
Registrar
(Date)

B.E.L. 31

Fig. 1. 75.

Notre loi reconnaît à l'élève et à l'enseignant des droits et des devoirs. Elle est énoncée dans l'article 10 de la loi.

In the Count - Counted bolden at

How to Pass Your Law Examinations and Other Useful

Take Notice that the sum of
has been paid in account is compensation in the above mentioned matter

An order was also filed in the said summary proceeding to the court for an order by the mortgage and application of the said sum for the benefit of the person entitled therefrom according with paragraph 5 of the first schedule to the Workmen's Compensation Act, 1906, and the said order of court made under the said Act.

Date of the _____

Reg. tra.

For

Hours of attendance, &c.

100.4 56

[illegible]

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[illegible]

In the County Court of _____, to be held at _____

Hedberg et al. / *The Role of the Teacher* 609

[illegible]

For the best of my knowledge and belief the persons interested in the settlement as dependants of the said child are

[State depends, with the up and relation, to demand workman,
and others of the industry]

I intend to apply for an order for the payment and application of the aid provided for the allotment of the same between the dependants of the said *deceased* as follows:—

That *the said dependants* shall receive the same in the following manner:

as to each other payment of the compensation due to them for the benefit of the person entitled thereto under the above-mentioned Act, and for compensation due to them

Dated this *day of* *19*.

(Signed)

To the Registrar of the *County of*
the said dependants
of the said deceased
at the said

(2) That *the said dependants* shall receive the same in the following manner:

In the County of *the said*
the said dependants

That *the said dependants* shall receive the same in the following manner:

on the *day of* *the month of* *the year of*
 in the *County of* *the said*
 for the *benefit of* *the said*
 as to each other payment of the compensation due to them for the benefit of the person entitled thereto under the above-mentioned Act, and for compensation due to them

I intend to apply for an order for the payment and application of the said sum as follows:—

That *the said dependants* shall receive the same in the following manner:

as to each other payment of the compensation due to them for the benefit of the person entitled thereto under the above-mentioned Act, and for compensation due to them

Dated this *day of* *19*.

(Signed)

To the Registrar of the *County of*

Form 105

*Application of the Workmen's Compensation Act, 1906, to the United Kingdom
by Robert, the Master, Robert, the Secretary, Ltd., Portsmouth 18*

Not to be printed but to be used as a Protocol

In the County Court of _____ at _____

In the matter of the Workmen's Compensation Act, 1906,
and

In the matter of an agreement for a decision on or in regard to a
certificate issued in the above mentioned County Court by the Workmen's
Compensation Board for the _____ of _____
in the County Court of _____

That Notice that A.B. _____ of _____ to whom under
an agreement for a decision on or in regard to a certificate in the above
mentioned matter issued in the County Court of _____ a weekly
payment of _____ payable by the above mentioned R & L Co.,
Limited, _____ a compensation for personal injury sustained
to the said A.B. _____ has been referred to and
in the course of his employment sustained to be made by the United
Kingdom;

And that the said A.B. _____ is bound to apply to the Registrar
at _____ the _____ day of _____ at the Court
in the _____ room, for an order determining a mode of settling the question
whether the incapacity of the said A.B. _____ is alone from the injury
is likely to be of a permanent nature;

As part of a medical practitioner's report on the incapacity of the employee
of the said A.B. _____ sustained from the injury in the course of

Dated this _____ day of _____

Applicant

cc

Applicant's solicitor

To the Registrar of the County Court
and to the Compensation Board

Form 106

Order of Registrar, Secretary, Ltd., Portsmouth 18

In the County Court of _____ at _____

Under the Workmen's Compensation Act, 1906

On the application of _____ of _____
in a copy of which _____ has been examined;

I hereby appoint Mr _____ of _____
one of the medical officers appointed by the Secretary of State for the
purpose of the Workmen's Compensation Act, 1906, to examine the said
_____ and to give his certificate as to whether the
incapacity of the said (name of workman) _____ resulting from the injury
is likely to be of a permanent nature.

A copy (or copies) of the report (or reports) of the medical practitioner
for practitioners by whom the said _____ has been examined is

No. 1041, 13

Plus

Transmitting Office dated May 30, 1967, captioned as follows:

In pursuance of the powers given by the County Courts Act 1888, and of all other powers enabling us in this behalf, We (the undersigned being two of the Commissioners of His Majesty's Treasury, whose names are hereto subscribed) do hereby, with the consent of the Lord Chancellor, order that on and after the 1st day of July 1907, the following alterations in the Treasury Order regarding fees in County Courts dated the 30th day of December 1903 shall have effect:

The *Psychological Bulletin*
 is published monthly by the
 American Psychological Association

I approve of this Order.

Journal of Management Education 31(1)

Schubert 1

Paragraph 1c is hereby annulled and the following paragraph shall stand in lieu thereof:

(i)-(ii) Account fee shall be payable under this Schedule by any party in respect of any proceedings by or against a workman under the Workmen's Compensation Act 1906 or the Workmen's Compensation Rules 1907, in the County Court prior to the award.

(b) On an application for the settlement of any matter by arbitration under the said Act and Rules when such application is not a proceeding by or against a workman, plaintiff and hearing fees shall be payable as in an ordinary action, and the poundage shall be calculated as in any claim for a sum of twenty pounds.

1c) Where a notice of claim for contribution or indemnity is filed under the said Act and Rules, a fee shall be paid on an award on such claim, or on the hearing of such claim, in like manner as on entering

1001 1st.
 4th 2,
 13

judgment on a default summons under paragraph 5 or the hearing of an action as the case may be.

(d) In proceedings under the said Act and Rules for the enforcement of an award memorandum or certificate or in order for payment of costs, the same fees shall be taken as on the like proceedings for the enforcement of a judgment for the like amount given in an action, less, in any case, in which fees for the issue service or execution of any process are prescribed by Schedule 11, the amount of such fees.

(e) On interpleader proceedings arising out of an execution issued for the enforcement of an award memorandum or certificate or an order for payment of costs under the said Act and Rules, fees shall be paid in like manner as an interpleader proceedings arising out of an execution issued in an action.

Schedule B – Part I

General

Rule 11(1) – Part

The words “The Workmen’s Compensation Act, 1906 and the Workmen’s Compensation Rules, 1907” shall be substituted for the words “The Workmen’s Compensation Acts, 1897 and 1900, in the Workmen’s Compensation Rules, 1898 to 1900” in paragraphs 8 and 9.

Paragraph 2c is hereby cancelled and the following paragraph shall stand in lieu thereof:

2c. On proceedings under the Workmen’s Compensation Act, 1906 and the Workmen’s Compensation Rules, 1907:

(X) *By the provisions of Nos. 6 and 7 attached to be taken as a part of proceedings by the said Workmen’s Compensation Rules:*

- | | | |
|---|---|---|
| | 1 | d |
| 1. On the filing of a special case under Rule 32 | 0 | 5 |
| 2. On an order for the detention of a ship, an order of release a bill of lading or an affidavit of justification under the Workmen’s Compensation Act, 1907 or the Shipowners’ Negligence Remedies Act, 1907 | 0 | 7 |
| 3. On an order adding a respondent under Rule 39(1) | 0 | 1 |
| 4. On an application to rectify the register or to remove a record from the register under Schedule 2, part 9, section 10 and Rule 18 or Rule 50 | 0 | 4 |

5	For preparing a Certificate under Section 1 Sub-section 1 and Rule 51	£ 5 0
6	On an application for a reference to a medical referee under Schedule 1 paragraph 15 the fee prescribed by Rule 54 (6)	0 5 0
7	On a reference to a medical referee in accordance with regulations made by the Secretary of State pursuant to Section 8 (1) (c)	0 10 0
8	On an application for the suspension of the right to compensation or to take proceedings or of the right to weekly payments under Schedule 1 pars 4 (1) or 15 and Rule 55	0 1 0
9	On an application for investment etc under Schedule 1 par 5 and Rule 56 or Rule 59	0 4 0
10	On an application for the payment of weekly payments into Court under Schedule 1 par 7 and Rule 57 etc	0 1 0
11	On an application for the variation of an Order under Schedule 1 par 9 and Rule 58	0 1 0
12	For every investment made by a Tribunal including the payment out or application of a sum allotted to any person by weekly or other periodical payments (charged once only and to be deducted from the sum ordered to be invested or allotted) For every £10 or part of £10 invested but so that the total fee shall not exceed 20	0 5 0
13	On an application for a reference to a medical referee under Schedule 1 par 18 and Rule 60	0 1 0
14	For a certificate of identity under Rule 60 (4) (c)	0 5 0
15	For receiving and forwarding any sum due to a workman residing out of the United Kingdom under Rule 60 (1) to be deducted from the sum to be forwarded	0 5 0
16	For every taxation of the costs of an award or between third parties and other parties to an arbitration	0 10 0
17	For every other taxation of costs	0 5 0
18*	On an application to the judge under Rule 65 (3) to (5) at a date subsequent to the hearing of the arbitration	0 1 0

19. On an application to the judge under Rule 66 or other than an application for an order for execution fees shall be payable. £ 8 s. d.
20. For examining every affidavit in support of an application for issue of execution of a judgment summons under Rules 67, 2, or 68, 2d. 0 1 6
21. On an application to set aside a writ or order or order under Rule 70. 0 1 0 0
22. For every Officer's copy certified copy of documents filed or recorded made in reference to any matter per folio. 0 0 1
23. For every sitting under Rule 35. 0 10 0
24. On any other proceeding not herein specified for which if such proceedings were taken in action a fee would be payable the fee which would be payable if such proceedings were taken in action.

HERALDIC OFFICERS.

The word "the Workmen's Compensation Act 1906" and the Workmen's Compensation Rules 1907 shall be substituted for the word "the Workmen's Compensation Act 1897 and 1906" in the Workmen's Compensation Rules 1898 to 1900 inclusive, rules 11 and 12.

12x. When the High Court is directed to detain a ship under the Workmen's Compensation Act 1906 or the Shipowner's Negligence (Remedies) Act 1905 the sum payable in execution of the order for detention and for keeping possession of the vessel after executing a warrant of arrest and keeping possession thereof shall in Admiralty action where the amount claimed exceeds £100 be a part of the costs, charges and expenses attending the custody of the ship: Rule 37. See.

12y. On any proceeding under the Workmen's Compensation Act 1906 and the Workmen's Compensation Rules 1907 not herein specified not being a proceeding by or against workmen prior to the award for which if such proceedings were taken in action a fee would be payable the fee which would be payable if such proceedings were taken in action.

STATUTORY RULES AND ORDERS, 1907

No. 107

MASTER AND SERVANT

Workmen's Compensation

Industrial Diseases.

Order of the Secretary of State, dated May 22, 1907, extending the provisions of the Workmen's Compensation Act, 1906, to certain Industrial Diseases.

Whereas by section 8 of the Workmen's Compensation Act, 1906, the provisions of that Act are applied in certain cases and subject to certain modifications to workmen disabled by or suspended from their usual employment on account of their having contracted a disease mentioned in the Third Schedule to the Act:

And whereas it is enacted by subsection (2) of the said section that if the workman at or immediately before the date of his disablement or suspension was employed in a process mentioned in the second column of the Third Schedule to the Act, and the disease contracted is the disease in the first column of that Schedule set opposite the description of the process, then the disease shall be deemed, except as otherwise provided in the subsection, to have been due to the nature of that employment unless the employer proves the contrary:

And whereas subsection (3) of the same section empowers the Secretary of State to make Orders for extending the provisions of that section to other diseases and other processes, and to injuries due to the nature of any employment specified in the Order, not being injuries by accident, either without modification or subject to such modifications as may be contained in the Order:

Now I, the Right Honourable Herbert John Gladstone, one of His Majesty's Principal Secretaries of State, by this Order made under subsection (3) of the said section, do hereby direct that the provisions of section 8 of the Workmen's Compensation Act, 1906, shall extend and apply to the diseases, injuries, and processes specified in the first and second columns of the Schedule annexed to this Order, as if the said diseases and injuries were included in the first column of the

Description of Post-employment	Description of Post-employment
13. Glances	Value of new spare manual affecting front shocker, including the cost of replacement
14. Transported in the car of	Any power carried out in connection with
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STATUTORY RULES AND ORDERS, 1907

No. 1-1

MASTER AND SERVANT

Workmen's Compensation Act, 1906

Regulations dated June 21, 1907, made by the Secretary of State and the Treasury in pursuance of the powers conferred on them by the Workmen's Compensation Act, 1906, section 8, subsections (1) to (4) and (5) and section 10, subsection (1), hereby make the following regulations:

1. The Right Honourable Herbert John Gladstone, one of His Majesty's Principal Secretaries of State, and We the Lords Commissioners of His Majesty's Treasury in pursuance of the powers respectively conferred on us by the Workmen's Compensation Act, 1906, section 8, subsections (1) to (4) and (5) and section 10, subsection (1), hereby make the following regulations:

Definitions

1. In these regulations—

- (a) "Act" means the Workmen's Compensation Act, 1906;
- (b) "Workman" means a workman as defined in section 13 of the Act;

- (iii) Certifying Surgeon means either the certifying surgeon mentioned in subsection (1) or a section 8 of the Act (4) a medical practitioner appointed by the Secretary of State under subsection (5) of section 8; (5) have the powers and duties of a certifying surgeon under this subsection;
- (iv) Appointed Surgeon means a surgeon having power in pursuance of any special rules or regulations made under the Factory and Workshop Act 1901 to suspend a workman from employment in the process or processes specified in such rules or regulations;
- (v) Medical Referee means a medical practitioner appointed by the Secretary of State (6) as a medical referee for the purposes of section 8 of the Act;
- (vi) The words "disability" to which the Act applies mean a disability mentioned in the third schedule to the Act or a disability of injury not being an injury by accident to which the provisions of section 8 of the Act have been extended by an Order made by the Secretary of State under subsection (6) of that section.

2. When a workman applies to a certifying surgeon for a certificate (hereafter called "a certificate of disablement") that he is suffering from a disability to which the Act applies, and is thereby disabled from earning full wages at the work at which he was employed, the certifying surgeon, on payment of the prescribed fee, and after obtaining the particulars specified in the schedule to the regulations and such (7) further information as may be required, the case is in the particular circumstances, he may deem necessary, shall either proceed at once at the application is made by the workman in person to make a medical examination of the workman or shall appoint forthwith a time and place for making such examination, and give notice thereof to the workman. Such notice, if given in writing, shall follow as closely as may be the form prescribed in the schedule. (1 and 2)

3. After personally examining the workman, the certifying surgeon shall either give the workman a certificate of disablement or shall certify that he is not satisfied that the workman is entitled to such certificate, and shall in either case deliver his certificate to the workman. The certificate given shall be in the form prescribed in the forms 3 and 5 schedule to these regulations.

4. Where in pursuance of any special rules or regulations made under the Factory and Workshop Act 1901 the certifying or appointed surgeon after having personally examined a workman suspends him from his usual employment on account of his having

contracted any disease to which the Act applies or where in the case of a workman applying to be suspended on account of his having contracted any such disease the surgeon as aforesaid after having personally examined such workman refuses to order his suspension he shall on the application either of the employer or of the workman, and on payment of the prescribed fee certify such suspension or refusal to suspend in accordance with the form prescribed in the schedule to these regulations and shall deliver such certificate to the applicant.

5. Where a certificate of disablement is given or a workman is suspended and the case is one in which under the provisions of sub-section (2) of section 8 of the Act as extended by any Order of the Secretary of State made under sub-section (1) of the said section the disease contracted by the workman will be deemed unless the employer proves or the certifying surgeon certifies to the contrary to have been due to the nature of the employment in the process in which at or immediately before the date of the disablement or suspension the workman was employed the certifying surgeon if he is of opinion that the disease contracted by the workman was not due to the nature of such employment shall certify accordingly. Such certificate shall where possible be given simultaneously with and included in the certificate of disablement or the certificate of any of suspension but may also be given separately on application by the employer and on payment of the prescribed fee and in either case shall follow the form prescribed in the schedule to these regulations.

For the purposes of this regulation an appointed surgeon shall have the same powers and duties as a certifying surgeon.

6. A copy of any certificate given by a certifying or appointed surgeon under the foregoing regulations shall together with any other documents relating to the case be retained and kept by the surgeon and copies of any such certificate shall on payment of the prescribed fee be supplied by the surgeon to the employer and the workman.

7. The fees which the certifying and appointed surgeons shall be entitled to charge in respect of duties performed under section 8 of the Act shall be as follows:

Fees payable by the Workman

(a) For any certificate given under regulation 3:

(i) in cases when the medical examination of the workman is made by the surgeon in the performance of his duties under the Factory and Workshop Act 1901 a fee of 1s.

when all other cases a fee of 5/- and when the workman is unable to present himself for examination at the residence or at other place fixed by the certifying surgeon for every mile or portion thereof which the certifying surgeon is required to travel therefrom for the purpose of examining the workman an additional fee of 1/-

- (ii) For any certificate of suspension or refusal to suspend under regulation 4 when the medical examination of the workman is made in pursuance of any special rules or regulations under the Factories and Workshop Act 1901 a fee of 1/-
- (iii) For a copy of any certificate obtained under regulation 4 a fee of 1/-

Part IV—Paragraphs by the Employer

- (i) For any certificate of suspension or refusal to suspend obtained by the employer under regulation 4 a fee of 1/-
- (ii) Where the employer applies under regulation 5 for a certificate that the disablement or refusal is not due to the nature of the employment in respect of every such application to include the certificate if given a fee of 2/-
- (iii) For a copy of any certificate obtained under regulation 5 a fee of 1/-

Part V—Medical Referees

8. Where an employer or workman is aggrieved by the action of a certifying or appointed surgeon in giving or refusing to give a certificate of disablement or in suspending or refusing to suspend a workman he may

- (a) if he is an employer within seven days of the receipt of the notice of disablement or suspension demand to be given under the Act or in a case of disablement if the notice is not accompanied by the certificate of the surgeon or a copy thereof and the employer forthwith require the workman to furnish him with a copy within seven days of the receipt of such copy or
- (b) if he is a workman within seven days of the date on which the surgeon has refused to give him a certificate of disablement or suspension

apply to the registrar of the county court for the district in which the workman was employed at the time of his examination by the surgeon for the matter to be referred to a medical referee, provided that it shall be within the discretion of the registrar on good cause shown to extend in any case to not more than seven days the period within which an application is required to be made.

Form 9 and 10 9. *a.* Any application under the foregoing regulation shall be made in writing and shall state the grounds on which the reference is asked for, in accordance with the form prescribed in the schedule to these regulations or as near thereto as may be.

b. The application shall be accompanied by the certificate or a copy of the certificate obtained from the surgeon by whose action the applicant is aggrieved and by any available report or reports of any medical practitioner by whom the workman has been examined, and if the applicant is an employer by the notice of disablement or suspension served on him by the workman and by an undertaking to pay any reasonable travelling expense incurred by the workman in attending for examination by the medical referee.

c. The applicant shall also file with the registrar such copies of the application and other documents referred to as may be necessary for the use of the medical referee and of the employer or workman as the case may be hereinafter referred to in the respondent who together with the applicant is directly interested in the application.

d. In the event of any dispute as to the amount of the travelling expenses payable to the workman by the employer the matter may be referred to the registrar whose decision shall be final.

e. It shall be the duty of the registrar on receiving an application to satisfy himself that it is duly made in accordance with the foregoing regulations and if it is not to return it for amendment. If and when the application is in accordance with the regulations he shall refer the matter forthwith to a medical referee and shall forward to such medical referee by registered post one of the copies of the application and the other documents filed therewith with an order of reference according to the form prescribed in the schedule.

Form 11,

Form 12

f. The registrar shall also make an order directing the workman to submit himself for examination by the medical referee. Before making such order the registrar shall enquire whether the workman is in a fit condition to travel for the purpose of examination and if satisfied that he is in a fit condition shall by the order direct him to

attend at such time and place as the referee may fix, and if satisfied that he is not in a fit condition to travel shall so state in the order of reference, and it shall be the duty of the workman on being served with the order to submit himself for examination accordingly.

12. The registrar shall deliver or send by registered post to both parties a copy of the order of reference, and shall also send to the respondent copies of the other documents forwarded to the medical referee, and shall send to the workman a copy of the order directing him to submit himself for examination.

13. In the case of a reference under these regulations the medical referee shall be one of those appointed by the Secretary of State for the county court circuit which includes the district in which the case arises, and if the circuit has been subdivided and medical referees have been appointed for the subdivisions shall be one appointed by the subdivision comprising the aforesaid district. Provided that if any medical referee is or has been specially appointed by the Secretary of State either for the circuit or otherwise for the purpose of deciding on any particular case or class of cases in which a reference may be made under these regulations the reference in any such case shall be made to the medical referee so appointed. Provided also that if the surgeon by whose action the applicant is aggrieved has been appointed a medical referee the reference shall not be made to him, but to such other medical referee as may be authorized to act.

14. The medical referee shall on receipt of an order of reference duly signed by the registrar of a county court, together with copies of the documents required to be sent therewith, fix a time and a place for a personal examination of the workman, and shall send notice to the employer and workman accordingly. It shall be the duty of the workman, and if the employer is the applicant of the employer or a person duly authorized by him to attend at the time and place fixed by the medical referee, and in the event of failure on the part of the workman or employer or both to appear as required by this regulation, the medical referee shall decide on the matter referred to him forthwith upon such information as shall be available, and with or without a personal examination. Provided that where the absence of the employer or his representative or of the workman is shown to the satisfaction of the medical referee to be unavoidable, or where the medical referee considers it necessary to apply for expert assistance as hereinafter provided, it shall be open to him to adjourn the inquiry on the reference and to resume it at such time and place as he may fix, after giving due notice to all parties concerned.

Appendix

15 Except as otherwise provided by regulation 14 the medical referee shall before deciding on the matter referred to him, make a personal examination of the workman, and shall consider any statements made or submitted by either party.

Form 15.

16 The medical referee shall in the form prescribed in the schedule to these regulations (subject to such additions and modifications as the circumstances of the case may require) notify in writing his decision to the registrar of the county court to the applicant and to the respondent.

Form 16

17 The medical referee shall send to the Home Office at the end of each quarter a statement accompanied by any vouchers necessary, in the form prescribed in the schedule to these regulations of the fees due to him for the quarter under these regulations.

18 The following fees and allowances are authorised to be paid to medical referees under these regulations:

- (i) For deciding the matter referred to him in any reference and for all duties performed in connection therewith 2 guineas.
- (ii) Where in order to examine the workman the medical referee is compelled to travel to a place distant more than two miles from his residence or such other centre as may be prescribed by the Secretary of State in addition to the above fee, 7s. for each mile beyond two and up to ten miles distant from such residence or centre and thereafter 1s. for each mile distant therefrom.
- (iii) In cases involving special difficulty the medical referee may apply for special expert assistance which may be granted by the Secretary of State if he thinks fit on such terms as to remuneration or otherwise, as he may with the sanction of the Treasury determine.

19 In cases where a claim is made under regulation 18 (ii) in respect of an examination of a workman, the medical referee in submitting his quarterly statement under regulation 17, shall certify the distance of the place where the examination was made from his residence or other prescribed centre.

Form 17

20 The registrar of a county court shall keep a record in the form prescribed in the schedule of all references made by him under these

Regulations as to Medical Referees. 859

regulations, and shall send the same to the Secretary of State at the end of each quarter.

21. These regulations shall come into force on the 1st day of July, 1907, and shall apply to England and Wales.

H. T. Galsworthy,

One of His Majesty's Principal
Secretaries of State.

Joseph A. Pease,
Chas. Norton,

Two of the Lords Commissioners of
His Majesty's Privy Seal.

21st June 1907.

Second.

(Form 1.)

*Notice to be obtained by Certificate of Secretary, approved by Medical
and Veterinary Councils of Department.*

1. Name and date of birth of
2. The certificate part of which certificate
is hereby applied for
3. Symptoms complained of
4. Employment to the nature of which
directly attributed
5. Name and place of residence of the
physician to be consulted by the
medical profession
6. (If the applicant is a resident in the
country, state whether he
is entitled to travel for purposes
of examination)

(Form 2.)

*Notice for Medical and Veterinary Certificate of Examination
by Secretary.*

Medical Council, London, 1907.

I hereby give you notice, with reference to your Application for a certificate of admission under the Secretary's Regulations of the above-named Act, that I propose to examine you at the place and on the day of admission, and that you are required to submit yourself for examination accordingly.

For (the Applicant)

(Signed)

Name and place of business of employer
 Address
 Dated this _____ day of _____
 (Signed) _____

(Form 7)

¹ Certificate to be given by State or Federal official in circumstances mentioned in the following:

1. When the certificate is to be filled out at the request of the employer, it shall be as follows:

(a) name of person
 (b) "mentioned in" or "added by an Order of the Secretary of State to,"
 (c) name of disease
 (d) "in the first column of that schedule" or "under the provisions of the said Order,"

But whereas the said workman appears to have been employed at or immediately before the date of his pension in (a) _____ being a process (b) _____ the second column of the third schedule to the Act, and the disease contracted by him, viz (c) _____ is a disease which (d) _____ I hereby certify that in my opinion the said disease is not due to the nature of such employment.

Dated this _____ day of _____
 (Signed) _____

(a) "certifying" or "appointed"
 (b) name of workman at which workman was employed
 (c) name of workman on regulations governing the employment
 (d) name of workman
 (e) "has" or "has not"
 (f) description of disease
 (g) name of person
 (h) "mentioned in" or "added by an Order of the Secretary of State to,"
 (i) "in the first column of that schedule" or "under the provisions of the said Order,"

2. If the certificate is to be filled out at the request of the employer, it shall be as follows:

When the certificate is to be filled out, it shall be as follows:

Whereas I, the (a) _____ in connection (b) _____ on the day of _____ pursuant to the (c) _____ made under the Factory and Workshop Act (1901), inspected (d) _____ from (e) _____ until employment on account of (f) _____ having contracted (g) _____ being a disease to which the Workmen's Compensation Act applies and where (h) _____ appears to have been employed at or immediately before the date of his pension in (i) _____ being a process (j) _____ the second column of the third schedule to the Act, and the disease above named is a disease which (k) _____ I hereby certify that in my opinion the said disease was not due to the nature of such employment.

Dated this _____ day of _____
 (Signed) _____

Comments by Cynthia Lee Appleton, Senior Lecturer at Bates College, Portland

and finally

[illegible]

1700-1800, 1800-1850, 1850-1900, 1900-1950, 1950-2000, 2000-2010, 2010-2020, 2020-2030, 2030-2040, 2040-2050, 2050-2060, 2060-2070, 2070-2080, 2080-2090, 2090-2100, 2100-2110, 2110-2120, 2120-2130, 2130-2140, 2140-2150, 2150-2160, 2160-2170, 2170-2180, 2180-2190, 2190-2200, 2200-2210, 2210-2220, 2220-2230, 2230-2240, 2240-2250, 2250-2260, 2260-2270, 2270-2280, 2280-2290, 2290-2300, 2300-2310, 2310-2320, 2320-2330, 2330-2340, 2340-2350, 2350-2360, 2360-2370, 2370-2380, 2380-2390, 2390-2400, 2400-2410, 2410-2420, 2420-2430, 2430-2440, 2440-2450, 2450-2460, 2460-2470, 2470-2480, 2480-2490, 2490-2500, 2500-2510, 2510-2520, 2520-2530, 2530-2540, 2540-2550, 2550-2560, 2560-2570, 2570-2580, 2580-2590, 2590-2600, 2600-2610, 2610-2620, 2620-2630, 2630-2640, 2640-2650, 2650-2660, 2660-2670, 2670-2680, 2680-2690, 2690-2700, 2700-2710, 2710-2720, 2720-2730, 2730-2740, 2740-2750, 2750-2760, 2760-2770, 2770-2780, 2780-2790, 2790-2800, 2800-2810, 2810-2820, 2820-2830, 2830-2840, 2840-2850, 2850-2860, 2860-2870, 2870-2880, 2880-2890, 2890-2900, 2900-2910, 2910-2920, 2920-2930, 2930-2940, 2940-2950, 2950-2960, 2960-2970, 2970-2980, 2980-2990, 2990-3000, 3000-3010, 3010-3020, 3020-3030, 3030-3040, 3040-3050, 3050-3060, 3060-3070, 3070-3080, 3080-3090, 3090-3100, 3100-3110, 3110-3120, 3120-3130, 3130-3140, 3140-3150, 3150-3160, 3160-3170, 3170-3180, 3180-3190, 3190-3200, 3200-3210, 3210-3220, 3220-3230, 3230-3240, 3240-3250, 3250-3260, 3260-3270, 3270-3280, 3280-3290, 3290-3300, 3300-3310, 3310-3320, 3320-3330, 3330-3340, 3340-3350, 3350-3360, 3360-3370, 3370-3380, 3380-3390, 3390-3400, 3400-3410, 3410-3420, 3420-3430, 3430-3440, 3440-3450, 3450-3460, 3460-3470, 3470-3480, 3480-3490, 3490-3500, 3500-3510, 3510-3520, 3520-3530, 3530-3540, 3540-3550, 3550-3560, 3560-3570, 3570-3580, 3580-3590, 3590-3600, 3600-3610, 3610-3620, 3620-3630, 3630-3640, 3640-3650, 3650-3660, 3660-3670, 3670-3680, 3680-3690, 3690-3700, 3700-3710, 3710-3720, 3720-3730, 3730-3740, 3740-3750, 3750-3760, 3760-3770, 3770-3780, 3780-3790, 3790-3800, 3800-3810, 3810-3820, 3820-3830, 3830-3840, 3840-3850, 3850-3860, 3860-3870, 3870-3880, 3880-3890, 3890-3900, 3900-3910, 3910-3920, 3920-3930, 3930-3940, 3940-3950, 3950-3960, 3960-3970, 3970-3980, 3980-3990, 3990-4000, 4000-4010, 4010-4020, 4020-4030, 4030-4040, 4040-4050, 4050-4060, 4060-4070, 4070-4080, 4080-4090, 4090-4100, 4100-4110, 4110-4120, 4120-4130, 4130-4140, 4140-4150, 4150-4160, 4160-4170, 4170-4180, 4180-4190, 4190-4200, 4200-4210, 4210-4220, 4220-4230, 4230-4240, 4240-4250, 4250-4260, 4260-4270, 4270-4280, 4280-4290, 4290-4300, 4300-4310, 4310-4320, 4320-4330, 4330-4340, 4340-4350, 4350-4360, 4360-4370, 4370-4380, 4380-4390, 4390-4400, 4400-4410, 4410-4420, 4420-4430, 4430-4440, 4440-4450, 4450-4460, 4460-4470, 4470-4480, 4480-4490, 4490-4500, 4500-4510, 4510-4520, 4520-4530, 4530-4540, 4540-4550, 4550-4560, 4560-4570, 4570-4580, 4580-4590, 4590-4600, 4600-4610, 4610-4620, 4620-4630, 4630-4640, 4640-4650, 4650-4660, 4660-4670, 4670-4680, 4680-4690, 4690-4700, 4700-4710, 4710-4720, 4720-4730, 4730-4740, 4740-4750, 4750-4760, 4760-4770, 4770-4780, 4780-4790, 4790-4800, 4800-4810, 4810-4820, 4820-4830, 4830-4840, 4840-4850, 4850-4860, 4860-4870, 4870-4880, 4880-4890, 4890-4900, 4900-4910, 4910-4920, 4920-4930, 4930-4940, 4940-4950, 4950-4960, 4960-4970, 4970-4980, 4980-4990, 4990-5000, 5000-5010, 5010-5020, 5020-5030, 5030-5040, 5040-5050, 5050-5060, 5060-5070, 5070-5080, 5080-5090, 5090-5100, 5100-5110, 5110-5120, 5120-5130, 5130-5140, 5140-5150, 5150-5160, 5160-5170, 5170-5180, 5180-5190, 5190-5200, 5200-5210, 5210-5220, 5220-5230, 5230-5240, 5240-5250, 5250-5260, 5260-5270, 5270-5280, 5280-5290, 5290-5300, 5300-5310, 5310-5320, 5320-5330, 5330-5340, 5340-5350, 5350-5360, 5360-5370, 5370-5380, 5380-5390, 5390-5400, 5400-5410, 5410-5420, 5420-5430, 5430-5440, 5440-5450, 5450-5460, 5460-5470, 5470-5480, 5480-5490, 5490-5500, 5500-5510, 5510-5520, 5520-5530, 5530-5540, 5540-5550, 5550-5560, 5560-5570, 5570-5580, 5580-5590, 5590-5600, 5600-5610, 5610-5620, 5620-5630, 5630-5640, 5640-5650, 5650-5660, 5660-5670, 56

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Appendix

(Form 12)

Order on Workman to submit report for Compensation by Medical Referee.

In the County Court at _____ holden at _____

*Thomas as ex parte Applicant*To A B _____ of _____ *(please state occupation)*

TAKE NOTICE that I have appointed Mr _____ of _____ one of the medical referees appointed by the Secretary of State for the purposes of the Workmen's Compensation Act 1906 to decide on the matter arising on the above application.

You are hereby required to submit yourself for examination by the referee *and, when necessary, at a consulting hospital*, and to attend for that purpose at such time and place as may be fixed by him.

Dated this _____ day of _____

Registrar

(Form 13)

*Notice by Medical Referee to Workman**Workman's Compensation Act, 1906*

I hereby give you notice that I have received from the Registrar of the County Court at _____ an order of reference appointing me to decide on your appeal against the action of Mr _____ *(name of employer)* in refusing to give you a certificate of disablement for (or in suspending you)

(If, in the certificate, no report has been made, or if report is made from the action of Mr _____ (name of employer) on a certificate of disablement for or in suspending you,

And that you are required to submit yourself for examination *at hospital* *or at a consulting hospital*, to submit yourself for examination at _____ on the _____ day of _____ at _____

Any statement made or submitted by you will be considered

(continued)

Medical Referee

To _____

(Form 14)

*Notice by Medical Referee to Employer**Workman's Compensation Act, 1906*

I hereby give you notice that I have received from the Registrar of the County Court at _____ an order of reference appointing me to decide on your appeal against the action of Mr _____ *(name of workman)* in giving a certificate of disablement to (or in suspending)

Regulations as to Medical Referrals

867

On, if the workman is the appellant,
on the appeal made by _____ (name of workman) against the action of
Mr _____ (name of employer) or in failing to give him a certificate of
disability or to suspend him;
And that I propose to examine _____ (name of employer) at
on the _____ day of _____ at _____
The statement made or submitted by _____ shall be considered.
And, if the employer is the appellant,
You, or some person duly authorized by you are hereby required to
attend at the above time and place.

Dated this _____ day of _____
19____

Medical Referee.

To

(Please to)

the copy of Medical Referee.

(Name of the appellant)

I hereby give you notice that you are duly required into the above-mentioned matter in accordance with the regulations of the Secretary of State, I decide as follows:

I do not allow the appeal of _____ (name of employer) against the certificate of disability given to _____ (name of workman) on the _____ day of _____.

I do not allow the appeal of _____ (name of employer) against the suspension of _____ (name of workman) on the _____ day of _____.

I dismiss the appeal of _____ (name of employer) from the refusal of Mr _____ (name of employer) to give him a certificate of disability in respect of _____ (name of workman).

I allow the appeal of _____ (name of employer) from the refusal of Mr _____ (name of employer) to give him a certificate of disability in respect of _____ (name of workman) and I fix the _____ day of _____ as the date on which the certificate must be given.

I dismiss the appeal of _____ (name of employer) against the refusal of Mr _____ (name of employer) to suspend him on the _____ day of _____.

Dated this _____ day of _____
19____

Medical Referee.

To the Employer,
and to the Employer,
and to the Workman.

STATUTORY RULES AND ORDERS 1907.

No. 187

MASTER AND SERVANT
Workmen's Compensation Act 1906

Regulations, dated June 21, 1907, made by the Secretary of State and the Treasury as to the duties and Recommendation of Medical Referees in England and Wales under the provisions of the First and Second Schedules to the Workmen's Compensation Act, 1906.

1. The Right Honourable Herbert John Gladstone, one of His Majesty's Principal Secretaries of State and We the Lords Commissioners of His Majesty's Treasury in pursuance of the powers respectively conferred on us by the Workmen's Compensation Act 1906, hereby make the following regulations:

Part I.—Duties and Powers of Referees.

1. In these regulations:

- (i) "Medical Referee" means a medical practitioner appointed by the Secretary of State to act as medical referee for the purposes of the Workmen's Compensation Act 1906;
- (ii) "Referee" means—
 - (a) in regulations in Part II, the appointment of a medical referee by the registrar of a county court to give a certificate in accordance with the provisions of paragraph (15) of the first schedule to the Workmen's Compensation Act 1906 as to the condition of the workman and his fitness for employment or as to whether or to what extent the incapacity of the workman is due to the accident;
 - (b) in regulations in Part III, the appointment of a medical referee by the registrar of a county court to give a certificate in accordance with the provisions of paragraph (18) of the first schedule to the Workmen's Compensation Act 1906 as to whether the incapacity resulting from the injury is likely to be of a permanent nature.

term regulations in Part V the appointment of a medical referee by a committee arbitrator or judge to report on any matter material to any question arising in an arbitration under the Workmen's Compensation Act, 1906;

Committee means a committee representative of an employer and his workmen with power to settle matters under the Workmen's Compensation Act, 1906, in the case of the employer and workmen

(iv) "Agreed Arbitrator" means a single arbitrator agreed on by the parties to settle any matter which under the Workmen's Compensation Act, 1906, is to be settled by arbitration

(v) "Appointed Arbitrator" means a single arbitrator appointed by the judge

(vi) "Judge" means County Court Judge

(vii) "The words 'district in which the case arises' mean the county court district in which all the parties concerned reside or, if they reside in different districts, the district prescribed by rules of court subject to any transfer made under those rules

2. In the case of any reference under these regulations the medical referee in the absence of special circumstances shall be one of those appointed by the Secretary of State for the county court circuit which includes the district in which the case arises, and shall, if the circuit has been subdivided, and medical referees have been appointed for the subdivisions, be one appointed for the subdivision which comprises the aforesaid district. Provided that where there has been a previous reference in any case any subsequent reference in the same case shall, if possible, be made to the same referee and be accompanied by the previous report or certificate or copy thereof of the medical referee.

3. The medical referee shall not accept any reference under these regulations unless signed or countersigned by the registrar of a county court and sealed with the seal of the county court.

Forms I, J, K,
and L.

4. The medical referee shall send to the Home Office at the end of each quarter statements in the forms prescribed in the schedule to these regulations, of the fees due to him for the quarter under these regulations.

5. In cases where a claim is made under the regulations in respect of travelling expenses, the medical referee, in submitting his quarterly

statements under regulation 4 shall certify the distance of the place to which he was required to travel from his residence or other prescribed centre.

6. In cases involving special difficulty the medical referee may apply to the Secretary of State for special expert assistance which may be granted by the Secretary of State if he thinks fit on such terms as to remuneration or otherwise as he may with the sanction of the Treasury determine.

7. The registrar of every county court shall keep a record in the form M of all references made under these regulations and of all cases in which a medical referee is summoned to sit as assessor and shall send a copy thereof to the Secretary of State at the end of each quarter.

8. These regulations shall come into force on the 1st day of July, 1907, and shall apply to England and Wales.

Part II. Regulations as to References under Schedule I
paragraph 15

9. The medical referee shall on receipt of a reference duly signed and sealed fix a time and place for the examination of the workman, and shall send notice accordingly to both the parties signing the application on which the reference is made.

10. Before giving the certificate required by the reference, the medical referee shall personally examine the workman and shall consider any statements that may be made or submitted by either party.

11. The certificate given by the medical referee shall be according to Form C, to the form prescribed in the schedule to these regulations.

12. The medical referee shall forward his certificate to the registrar from whom he received the reference.

13. The following shall be the scale of fees to be paid to medical referees in respect of references under this part of the regulations:

- (i) For a first reference (to include all the duties performed in connection therewith) 2 guineas
- (ii) For a second or subsequent reference to the same medical referee in the same case 1 guinea

- (m) Where in order to examine the injured workman the medical referee is compelled to travel to a place distant more than two miles from his residence or such other centre as may be prescribed by the Secretary of State in addition to the above fee 5s. for each mile beyond two and up to ten miles distant from such residence or centre and thereafter 1s. for each mile distant therefrom.

Part III—Regulations as to Referees and (Schedule I—paragaphs 13-18)

Form D 13. The medical referee shall on receipt of a reference duly signed and sealed fix a time and place for the examination of the workman and shall send notice accordingly to the workman.

14. Before giving the certificate required by the reference the medical referee shall make a personal examination of the workman.

Form E 15. The certificate given by the medical referee shall be according to the form prescribed in the schedule to these regulations.

16. The medical referee shall forward his certificate to the registrar from whom he received the reference.

17. The fee to be paid to a medical referee in respect of a reference (to include all the duties performed in connexion therewith) under this part of these regulations shall be one guinea.

Part IV—Regulations as to Remuneration of Medical Referees (Schedule I—paragaphs 19-21)

18. Where a medical referee attends on the summons of the judge for the purpose of sitting with the judge as an assessor as provided for in paragraph 3a of the second schedule to the Workmen's Compensation Act, 1906 he shall be entitled for such attendance (to include his services as assessor) to a fee of 3 guineas and where in order so to attend on the judge he is compelled to travel to a place distant more than two miles from his residence or such other centre as may be prescribed by the Secretary of State he shall be entitled, in addition to the above fee 5s. for each mile beyond two, and up to ten miles distant from such residence or centre and thereafter 1s. for each mile distant therefrom.

Regulations as to Medical Reference 873

Part V—Regulations as to References and Schedule II
proceedings

Medical Reference

20 Before making any reference, the committee, arbitrator or judge shall be satisfied after hearing all medical evidence tendered by either side that such evidence is either conflicting or insufficient on some matter which seems material to a question arising in the arbitration and that it is desirable to obtain a report from a medical referee on such matter.

Form and Method of Reference

21 Every reference shall be made in writing, and shall state the matter on which the report of the medical referee is required and the question arising in the arbitration to which such matter seems to be material. Such reference shall be in accordance with the form prescribed in the schedule to these regulations or as near thereto as may be.

The reference shall be accompanied by a general statement of the medical evidence given on behalf of the parties, and if such evidence has been given before a committee or an agreed arbitrator each medical witness shall sign the statement of his evidence and may add any necessary explanation or correction.

22 On making the reference to the medical referee the committee, arbitrator or judge shall make an order in the form prescribed in the second schedule directing the injured workman to submit himself for examination by the medical referee. Before making such order they shall inquire whether he is in a fit condition to travel for the purpose of examination, and if satisfied that he is in a fit condition they shall by the same order direct him to attend at such time and place as the referee may fix.

It shall be the duty of the injured workman to obey any such order.

If the committee, arbitrator or judge is satisfied that the workman is not in a fit condition to travel, they shall so state in the reference.

23 The reference shall be signed, if made by a committee, by the chairman and secretary of the committee; if made by an agreed arbitrator, by the arbitrator; if made by a judge or an appointed arbitrator, by the judge or arbitrator; or by the registrar of the county court in which the arbitration is pending.

B.E.L.

21. A committee or an agreed arbitrator making a reference, shall without naming a medical referee, address the reference in general terms to one of the medical referees appointed by the Secretary of State for the purposes of the Workmen's Compensation Act, 1906, and shall forward it to the registrar of the county court of the district in which the case arises.

Duties of Registrar.

25. (1) In the case of a reference by a committee or agreed arbitrator the registrar on receiving the reference—

- (a) Shall see that the reference is in accordance with these regulations and if it is not shall return it for amendment,
- (b) Shall insert the name of the medical referee proper to be appointed,
- (c) Shall when the reference is in accordance with these regulations countersign and seal it and forward it forthwith to the medical referee.

(2) In the case of a reference by a judge or an appointed arbitrator the registrar of the court in which the arbitration is pending shall sign (or countersign) and seal it and forward it forthwith to the medical referee.

26. The registrar on receiving a report from a medical referee under Regulation 28, shall forthwith file a copy at the court and transmit the report to the committee arbitrator or judge by whom the reference was made.

If the committee arbitrator or judge shall direct that the parties be at liberty to inspect the report the registrar shall on receiving notice of such direction permit such inspection to be made during office hours and shall on the application and at the cost of any party furnish him with a copy of the report or allow him to take a copy thereof.

Report of Medical Referee.

Form H.

27. The medical referee shall, on receipt of a reference duly signed and sealed, appoint a time and a place for the examination of the workman, and shall send him notice accordingly.

28. The medical referee shall give his report in writing and shall forward it to the registrar from whom he received the reference.

29. The committee arbitrator or judge may by request signed and forwarded in the same manner as the reference remit the report to the medical referee for a further statement on any matter not covered by the original reference.

Regulations as to Medical Referees 875

Fees.

30. The following shall be the scale of fees to be paid to the medical referees in respect of reference under this part of the regulations:

- (a) For a first reference to include examination of the injured workman and written report 2/- (twos).
- (a) For a further statement under regulation 21 on any matter not covered by the original reference 1/- (one).
- (a) For a second or subsequent reference to the same referee in a further arbitration on the same case to include examination if necessary and written report 1/- (one).
- (a) Where in order to examine the injured workman the medical referee is compelled to travel to a place distant more than two miles from his residence or such other centre as may be prescribed by the Secretary of State in addition to the above fees 1/- for each mile beyond two and up to ten, miles distant from such residence or centre and thereafter 1/- for each mile distant therefrom.

Witness.

One of His Majesty's Principal
Secretaries of State

Joseph A. Pease

J. H. Whithy

Two of the Lords Commissioners of
His Majesty's Treasury

24th June, 1907

Notice to

(Printed A)

Notice by Medical Referee. To be given to the injured workman on the application made to the Secretary of State (Schedule I (15)).

His Majesty's Commissioners for the

To

I hereby give you notice that in accordance with the Reference made to me by the Registrar of the County Court of _____ holden at _____ under Schedule I, paragraph (15), of the above-named Act in the case of _____

_____ (*name and address of workman*) I propose to examine the
said _____ at _____ on the _____ day of _____

Any statement made or submitted by you for, or which is added to or
in addition, by the employer, will be considered _____

Dated this _____ day of _____

(Signed)

Medical Referee.

(Form B)

*Notice by Medical Referee to Workman of Referee's report on application
on Workman's Compensation Act (1906)*

Workman's Compensation Act, 1906

To _____

I hereby give you notice that in accordance with the Reference made to
me in your certificate of Reference made on the _____ day of _____ in the County
Court of _____ (*name of County*), by the Registrar of the County
Court of _____ I holden at _____, under
Schedule I paragraph (1) of the above named Act, I propose to examine
you for the said _____ at _____ on the _____ day of _____
at _____ o'clock.

And you are required to submit yourself for the said _____ is required
to submit himself for examination accordingly.

Any statement made or submitted by you for, or which is added to
the statement, by the workman, will be considered _____

Dated this _____ day of _____

(Signed)

Medical Referee.

(Form C)

*Certificate of Medical Referee as to condition of Workman and power for
employment, or a certificate of refusal to grant incapacity of Workman
as due to the accident (Schedule I (15))*

Workman's Compensation Act, 1906

In accordance with the Reference made to me by the Registrar of the
County Court of _____ I holden at _____ upon the application
of _____ (*names and addresses of parties*) I have on the _____ day
of _____ examined the said _____ (*name of workman*) and I
hereby certify as follows:—

Regulations as to Medical Reports

877

1. The and is
and in condition such that he is

* Describe state of health

* State whether workman is fit for his ordinary or other work, specifying where he is not fit, or if they he is unable to work of

2. The amount of the and

is

* State whether or to what extent the incapacity is due to the accident or to any disease arising within a year of the date of the accident

NOTE. The above provisions apply to persons employed in any occupation or business.

Date of the

of the

(Signed)

Medical Report.

(Under 14)

As the date of the accident is (State date) (18)

At the age of (State age) (18)

To

The above provisions apply to persons employed in any occupation or business. The above provisions apply to persons employed in any occupation or business. The above provisions apply to persons employed in any occupation or business.

Date of the

of the

(Signed)

Medical Report.

(Under 14)

Certified that the above Report (See under 14)

At the age of (State age) (18)

In accordance with the Regulations made to comply with the Statute of the County Council of (State name of County) (18) the above-named Act, I have on the day of (State day) (18) examined

of _____ (name and address of
 person) and I hereby certify that his menapency is or is not, likely to be
 of a permanent nature

Dated this _____ day of _____ (Month)

Medical Officer

(Print Name)

Reference to Medical Officer (Section 11 (15))

In the matter of the Workmen's Compensation Act, 1906

and

In the matter of an Arbitration between -

A B

Address
 Description

Applicant,

and

C D

Address
 Description

Respondent,

As the case may be { (d) We, _____ a committee
 representative of _____ and
 his workmen, in compliance to arbitrate in the matter
 an member of the Workmen's Compensation Act between
 A B and C D _____, to whom referred upon by
 { (b) I, _____, in pursuance of the order made between
 them under the Workmen's Compensation Act, 1906
 { (c) I, _____, District Court Judge,
 { (d) I, _____, arbitrator appointed by
 a panel of Court and Council

have heard the evidence tendered by both parties and hereby certify that in
 our (or my) opinion the medical evidence given before us (or me) is com-
 pletely (or in substance) correct and we (or I) are of opinion that it is
 material to a question arising in the above mentioned arbitration, and that
 it is desirable to obtain a report from a medical referee on such matter, as
 follow

* Insert name
 of injured
 workman

(1) On the _____ day of _____ personal injury was (or is)
 alleged to have been caused to _____
 by accident arising out of and in the course of his employment, under the
 following circumstances

† Here state
 the facts of the
 accident as
 ascertained from
 the evidence

Or, in a case of industrial disease to which this Act applies

‡ Name
 of disease

(1) On the _____ day of _____ the said _____ was,
 under section 8 of the above-named Act, certified to be disabled by, or sus-
 pended from his usual employment on account of his having contracted, a
 disease to which this subsection applies, namely ‡

(2) The matter on which we are (or I am) satisfied that it is desirable to
 obtain a report is—

Regulations as to Medical Referees 871

(c) Such matter seems to be material to the following question arising in the arbitration, viz.

We refer to the referee appointed by the Industrial State for the purpose of the Workmen's Compensation Act, 1906, to examine the injured workman on the matter pointed above, and to report to the referee, whether the injured workman is in a fit condition to travel for the purpose of being examined, and he has been directed to attend on the referee for examination at such time and place as shall be fixed by the referee, or does not appear to be in a fit condition to travel for the purpose of being examined.

We refer to the medical evidence given before the referee, and to the fact that the injured workman is in a fit condition to travel for the purpose of being examined, and he has been directed to attend on the referee for examination at such time and place as shall be fixed by the referee, or does not appear to be in a fit condition to travel for the purpose of being examined.

The referee is requested to forward his report to the referee, whether the injured workman is in a fit condition to travel for the purpose of being examined, and he has been directed to attend on the referee for examination at such time and place as shall be fixed by the referee, or does not appear to be in a fit condition to travel for the purpose of being examined.

He is requested to forward his report to the referee, whether the injured workman is in a fit condition to travel for the purpose of being examined, and he has been directed to attend on the referee for examination at such time and place as shall be fixed by the referee, or does not appear to be in a fit condition to travel for the purpose of being examined.

Dated this day of

(Signed)

On behalf of the Committee

Secretary of the Committee

Secretary of the Committee

Secretary of the Committee

Secretary of the Committee

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§ The name must, if the referee is made by a committee or agreed referee, be included in the list of referees.

For signature of Judge or arbitrator

Secretary of the Committee

Secretary of the Committee

Secretary of the Committee

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Regulations as to Medical Reform. 881

(FORM 14)

*Medical Reform: Statement of Information as to Medical Reform, whether
Submitted to the*

Number	Name of	Information	Information	Information	Whether	Information	Information
	Submitted	to the	to the	to the	submitted	to the	to the
	to the	to the	to the	to the	to the	to the	to the
	to the	to the	to the	to the	to the	to the	to the

to the

to the

(FORM 14)

*Medical Reform: Statement of Information as to Medical Reform, whether
Submitted to the*

Number	Name of	Information	Information	Information	Whether	Information	Information
	Submitted	to the	to the	to the	submitted	to the	to the
	to the	to the	to the	to the	to the	to the	to the
	to the	to the	to the	to the	to the	to the	to the

to the

(FORM T)

[illegible]

* I hereby certify that I examined the above mentioned
(name of workmate) on _____, 19____, who is a dutiful
and honest employee on per cent of centre _____
(Signed) _____

11.00M 71)

Record of Release, Arrest, or Transfer by		
Commitment Center	By	Name of the Person
	For	or
	Transferred	

Number of Participants	Names of Participants	Workplaces Employed	Interviewer's Reference to Model	Provisional Interviewer's Reference to Model	Written and Oral Instructions to Interviewer's Model	Model Repeated	Date and number of participant's interview, if any
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)

* Here say whether committee, agreed arbitrator, county court judge, or appointed arbitrator.

NOTE.—In cases where there is no Reference, but the Medical Referee is summoned to sit as assessor, the Registrar should write a note to that effect across columns 4, 5, and 6.

STATUTORY RULES AND ORDERS, 1907
No. 505

MASTER AND SERVANT
Workmen's Compensation Act, 1906

Regulations of the Secretary of State dated June 28, 1907, as to examination of a workman by a Medical Practitioner provided and paid for by the Employer under the provisions of the First Schedule to the Workmen's Compensation Act, 1906.

In pursuance of the powers vested in me by paragraph (15) of the First Schedule to the Workmen's Compensation Act, 1906, I, the Right Honourable Herbert John Gladstone, one of His Majesty's Principal Secretaries of State, do hereby make the following regulations:

1. Where a workman has given notice of an accident or is in receipt of weekly payments under the Act, he shall not be required to submit himself against his will for examination by a medical practitioner provided by the employer except at reasonable hours.

2. A workman in receipt of weekly payments shall not be required, after a period of one month has elapsed from the date on which the first payment of compensation was made, or if the first payment is made in obedience to the award of a committee or arbitrator, from the date of the award, to submit himself against his will for examination by a medical practitioner provided by the employer except at the following intervals:—Once a week during the second and once a month during the third, fourth, fifth, and sixth months after the date of the first payment or the award, as the case may be, and thereafter once in every two months.

Provided that where after the second month an application has been made to the county or Scotland the sheriff court or to a committee for a review of the weekly payment the workman may be required, pending and for the purposes of the settlement of the application, to submit himself to one additional examination.

H. J. Gladstone

One of His Majesty's Principal
Secretaries of State

Whitehall,
28th June 1907

Appendix

STATUTORY RULES AND ORDERS, 1907

No. 500

MASTER AND SERVANT
Workmen's Compensation Schemes

Regulations dated July 1, 1907 made by the Chief Registrar of Friendly Societies under the Workmen's Compensation Act, 1906

In pursuance of the powers vested in me by the above-mentioned Statute, I, James Dunn, Sheriff-Sub-Chief Registrar of Friendly Societies, hereby make the following Regulations:

1. Every application for certificate to a scheme under section 4 of the Workmen's Compensation Act, 1906, or these regulations formed the Act, shall be in Form A annexed to these regulations, and shall be accompanied by the documents mentioned in such Form. If a scheme includes the workmen of more than one employer a separate application shall be made by each employer.

2. Every application for re-certification under section 15 of the Act of a scheme certified under the Workmen's Compensation Act, 1897, and in force on 1st July, 1907, shall be in Form C, and shall be accompanied by the documents mentioned in such Form. If a scheme includes the workmen of more than one employer a separate application shall be made by each employer.

3. Every application for certificate to a partial amendment of a scheme shall be in Form D and shall be accompanied by the documents mentioned in such Form. If a scheme includes the workmen of more than one employer a separate application shall be made by each employer.

4. Every application for renewal of certificate to a scheme shall be in Form E, and shall be accompanied by the documents mentioned in such form. If a scheme includes the workmen of more than one employer a separate application shall be made by each employer.

5. Every complaint by or on behalf of workmen shall be as nearly as may be in Form F.

Regulations by Registrar of Friendly Societies 885

6. The following fees shall be payable in advance for matters to be transacted and for the inspection of documents under the Act—

For every certificate to a scheme for the renewal of certificate to a scheme, or for the re-certification (under section 17 of the Act) of a scheme when the number of workmen in the employment—

	£	s	d
does not exceed 100	1	0	0
exceeds 100 but does not exceed 500	2	0	0
500	3	0	0
1000	5	0	0

For every certificate to a partial amendment of a scheme 1 0 0

In any of the above cases when a scheme includes the workmen of more than one employer the fee will be payable by each employer in accordance with the number of workmen in his employment.

For every declaration as to distribution of fund on expiration or revocation of certificate to a scheme when the amount for distribution—

does not exceed £500	5	0	0
exceeds £500	Not exceeding 1% of the amount for distribution		

For every document required to be signed by a Registrar or to bear the seal of the Central Office and not interchangeable with any other fee to the Registrar 0 2 6

For every inspection on the same day of document (whether one or more) in the custody of the Registrar relating to one and the same scheme 0 1 0

For every copy or extract of any document in the custody of the Registrar not exceeding 216 words 0 1 0

And if exceeding that number 1d per block of 72 words in addition to the fee of any for the signature of a Registrar or seal of the Central Office.

W. D. STOUT
Chief Registrar of Friendly Societies

1st July, 1907

Appendix

Form A

Workmen's Compensation Act, 1906

Application for Certificate to Scheme

Full name and address of employer

Nature of employment

Situation of works

This application is made by the undersigned employer and five workmen

If the scheme includes other employers and their workmen a separate application must be made by each employer and provision for administration, etc., should be made in the scheme.

The total number of workmen in the employment is _____, and at a ballot, taken on _____ 19____, _____ of such workmen voted in favour of the scheme, an abstract of which is hereby submitted, together with a declaration that my workman objecting to the same was at liberty to communicate his view to the Registrar of Friendly Societies, 25, Abchurch Lane, London, E.C. 4, for as *the case may be* was posted in a conspicuous position at all the works for a period of at least fourteen days immediately preceding the date of such ballot.

The scheme includes (or does not include) other employers and their workmen _____

The following is a comparison of the provisions of the scheme with those of the Act:—

SCHEME OF CONTRIBUTIONS

By Act By Scheme

Where death results from the injury

(a) If the workman leaves not less than £150 to £300, subject to (a) any dependants wholly or partly dependent upon him, the conditions mentioned in the Act

(b) If the workman does not leave such sum, but leaves any dependants in part dependent upon him, his earnings

(c) If the workman leaves no dependants

Regulations by Registrar of Friendly Societies 887

	Scale of Compensation
	By Act By Scheme

Where total incapacity for work results from the injury—

- | | |
|--|--|
| (a) All cases other than those under (b) | (i) Not exceeding 50% of net weekly earnings, and not exceeding £1 per week, but no compensation for more than the incapacity, but less than two weeks |
| (a) If the workman is under 21 years of age and in receipt of child benefit, not more than 20% | (i) Not exceeding net weekly earnings, and not exceeding £1 per week, but no compensation for more than the incapacity, but less than two weeks |

Where partial incapacity for work results from the injury—

(b) Not exceeding the difference between weekly earnings before and after the injury, and not exceeding the net weekly receipt of compensation

The following are the benefits provided by the scheme other than those of the Act—

- The contribution of the employer to the scheme to be
- The contribution of the workman to the scheme to be

The scheme contains provision enabling a workman to withdraw from the scheme, but does not contain any obligation upon the workman to join the scheme as a condition of their being

With this application to—

- (a) Two printed copies of the scheme, each attached in covers and signed by the applicants,
- (b) An actuarial report on the scheme by Mr
- (c) A statutory declaration in Form B verifying the result of the ballot, etc
- (d) A statement showing (1) the views of the general body of the workmen as to the scheme, and (2) how such views were ascertained, and

* See regulation 6

(c) The law of* prescribed by the Regulations.
The views of the employer are as follows:—

The views of the workmen are as follows:—

If the employer is a body corporate the seal of the corporation should be affixed and duly witnessed in the space provided for the signature

Date

11

Workmen
Employer

Form B

Workmen's Compensation Act, 1906

Declaration of intent of Employer, &c.

† This declaration is to be made either by the employer, or by the manager of the works, or by some other responsible person.

* Insert "certificate to" or "re-certification of" or "the case may be"

I, full name of employer

of
do solemnly and mutually declare that at a meeting on _____, 19____, after forty-eight hours' notice thereof had been given, _____ out of the total number of workmen in the employment of _____ voted in favour of the scheme (apportioned for*) _____ which is attached to this declaration, and filed on the date of the _____ and ballot the total number of workmen in the _____ and employment of _____.

And I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

Signature of declarant

† Taken and received before me, _____
of His Majesty's Justice of
the Peace for the County of _____
at _____
in the said County, this _____
day of _____, 19____.

* This is to be altered as the case requires where any declaration is made before a Borough Magistrate or Commissioner of Customs.

SCALE OF COMPENSATION			
	By Act	By Scheme	
		As now submitted	As already certified
Where total incapacity for work results from the injury:—			
(a) All cases, other than the remainder	(a) Not exceeding 50 of average earnings, and not exceeding 44 per week, but no compensation for lost week if the incapacity is less than two weeks	(a)	(a)
(b) If the workman is under 21 years of age and his average weekly earnings are less than 20s	(b) Not exceeding average earnings, and not exceeding 49 per week, but no compensation for lost week if the incapacity is less than two weeks	(b)	(b)
Where partial incapacity for work results from the injury	A for total incapacity, but not exceeding the difference between average earnings before incapacity and average earnings while in receipt of compensation.		

The following are the benefits provided by the scheme other than those of the Act:—

The contribution of the employer to the scheme is to be

The contribution of the workmen to the scheme is to be

The scheme contains provisions enabling a workman to withdraw from the same, but does not contain any obligation upon the workman to join the scheme as a condition of their hiring.

With this application are sent

(a) Two printed copies of the scheme, each stitched in covers and signed by the applicants;

(b) An actuarial report on the scheme by Mr

(c) A statutory declaration in Form B verifying the result of the ballot, etc.

Regulations by Registrar of Friendly Societies, 1901

(d) A statement showing (1) the views of the general body of the workmen as to the scheme, and (2) how such views were ascertained, and

(e) The fee of* _____ provided by the Regulations. * See regulations.
The views of the employer are as follow: _____

The views of the workmen are as follow: _____

Date _____, 19____	_____ Workmen, _____ Employer	If the employer is a body corporate the seal of the corporation should be affixed and duly witnessed in the space provided for the signature.
--------------------	--	---

Form 14.

The Registrar of Friendly Societies, 1901.

-- --

Application for Certificate for registration of a scheme.

Full name and address of employer _____

Number of scheme _____

Date of certificate for scheme _____, 19____.

Application for certificate to an amendment of the above scheme made by the undersigned employer and his workmen _____

With the application must be—

- (a) A printed copy of the scheme as certified, marked by the employer, where the alterations occur and where they do not.
- (b) Two printed copies of the proposed scheme, each marked by the applicant.
- (c) A statement showing (1) the views of the general body of workmen and (2) how such views were ascertained, and
- (d) The fee of 1/- provided by the Regulations.

The views of the general body of workmen are as follow: _____

Date _____, 19____	_____ Workmen, _____ Employer	If the employer is a body corporate the seal of the corporation should be affixed and duly witnessed in the space provided for the signature.
--------------------	--	---

Form B

Workmen's Compensation Act, 1906.

Application for renewal of certificate for scheme.

Full name and address of employer.

Nature of employment.

Situation of works.

This application is made by the undersigned employer and five workmen

If the scheme includes other employers and their workmen a separate application must be made by each employer and provision for administration, etc., should be made in the scheme.

The total number of workmen in the employment is _____, and the number continuing out under the scheme is _____.

This scheme includes (or does not include) other employers and their workmen.

(If any modification of the scheme is now proposed, the following comparative statement should be filled in)

The following is a comparison of the provision of the scheme now submitted with those of the scheme as certified and with those of the Act.

COMPARATIVE STATEMENT

	By Scheme	
	As certified	Proposed alterations
When death results from the injury—		
(a) If the workman leaves any dependents wholly dependent upon his earnings	(a) Not exceeding £100, unless subject to the conditions mentioned in the Act	(a)
(b) If the workman does not leave any such dependents but leaves any dependents in part dependent upon his earnings	(b) Not exceeding £100	(b)
(c) If the workman leaves no dependents	(c) Not exceeding £100	(c)

Regulations by Registrar of Friendly Societies 893

TABLE OF CONTENTS

	By scheme	
	As certified	Proposed alterations
Where total incapacity for work results from the injury		
(a) All cases other than the certified	(a) Not a condition of a certificate but no compensation for an injury if the incapacity is not less than two years	(a)
(b) All the conditions under 21 and 22 of the Act as to the certificate	(b) Not a condition of a certificate but no compensation for an injury if the incapacity is not less than two years	(b)
Where partial incapacity for work results from the injury	A for total incapacity, but not a condition of the certificate for the difference between the amount before incapacity and after the certificate is while in receipt of compensation	
Payment other than those of the Act		
Contribution of employers		
Contribution of workmen		
With this application	ent	
(a) Two printed copies of the scheme, each attached in covers and signed by the applicants		
(b) An annual report on the working of the scheme during the preceding last year, to the		

* The Respondent may require a ballot if he thinks fit.

† See regulations 6

* (a) A statement showing (1) the views of the general body of the workmen as to the scheme, and (2) how such views were ascertained; and

(d) The fees of § provided by the Regulations.
The views of the employer are as follow —

The views of the workmen are as follow —

If the employer is a body corporate the seal of the corporation should be affixed and duly witnessed on the signature provided for the signature	Date	Women Employer

Form 1

REGULATION 17 OF 1906, SECTION 1, FORM

Form of Complaint of Breach

Scheme No.

That the Respondent has done something,

2. As a result of which, the workmen

Complainant here is made to or on behalf of the workmen of (the Employer under the above mentioned scheme) —

1. That the benefit conferred by the scheme referred to conform to the condition stipulated in sub-section (1) of section 3 of the above mentioned Act in the following, to wit:—

2. That the provisions of the scheme are being violated in the following respect:—

3. That the scheme is not being fairly administered in the following respects:

4. That the following reasons exist for revoking the certificate to the scheme:

You are requested to examine into this complaint, and if satisfied that

good cause exists for it, to revoke the certificate, but the scheme under the cause of complaint is removed.

The undersigned have been authorized in the following manner to make the complaint on behalf of themselves and the other workmen of the said employer.

Workmen

State _____, P.

WORKMEN'S COMPENSATION RULES, 1908

No. 2

Dated the 21st Day of November 1908

The following Rules shall have effect under the Workmen's Compensation Act, 1903.

These Rules may be cited as the Workmen's Compensation Rules, 1908. No. 2, or each rule may be cited as if it had been one of the Workmen's Compensation Rules, 1907, herein referred to as the principal Rules, and had been numbered therein by the number of the Rule placed in the margin opposite such Rule.

These rules shall come into operation on the 1st day of January, one thousand nine hundred and nine.

Appointments of Persons to be taken

1. In Amendment of Rule 33. The following words shall be inserted in paragraph 1 of Rule 33 of the principal Rules after the word "Act" viz. --

whether before a committee or an agreed arbitrator or before a judge or an arbitrator appointed by a judge.

2) The following words shall be inserted in paragraph 1 of the principal Rules after the word "connected" viz.

or where death results from the injury by any officer or member of any society or other body of persons of which the deceased workman was a member or with which he was connected.

Memorandum under Schedule II, Paragraph 3

2. [Rule 41a—*Amendment of Rule 41*].—The following paragraph shall be added to Rule 41 of the principal Rules viz.—

[Form 36a]—“Where the matter is decided by agreement, here shall be added to the memorandum a paragraph according to the Form 36a in the Appendix, containing a statement of such of the particulars mentioned in that form as are applicable to the circumstances of the case.”

3. [Rule 42a—*Amendment of Rule 42*].—The following paragraphs shall be added to Rule 42 of the principal Rules viz.—

(1) Where the matter is decided by agreement the registrar shall, unless the original agreement duly executed is left or sent to be recorded satisfy himself that such original agreement has been duly executed and may for that purpose require such agreement to be produced but he shall not be entitled to retain the same where a memorandum thereof is left or sent to be recorded.

(2) An agreement or memorandum of an agreement may be left with or sent to the registrar by insurers on behalf of the parties interested.

*Retention of Agreement executed for Request as to the Judge
Schedule II—Paragraph 3—Proceeds.*

1. [Rule 49a—*Amendment of Rule 49*].—(1) The following words shall be added to paragraph 1 of Rule 49 of the principal Rules, viz.—

“And it shall be the duty of the parties to the agreement to answer such inquiries and give such information accordingly.”

(2) The following words shall be added to paragraph 8 of Rule 49 of the principal Rules viz.

“And in particular if it appears that a report of the registrar has been rendered necessary by the neglect or refusal of any party to an agreement to furnish any information reasonably required of him by the registrar, such party may be ordered to pay the costs of the inquiry.”

Application for Variation of Order under Schedule I, Paragraph 9

5. [Rule 58a—*Amendment of Rule 58*].—Paragraph 1 of Rule 58 of the principal Rules shall be read and construed as if the words “by or on behalf of” were substituted therein for the word “by.”

(c) The said A B received the following payments, allowances, or benefits from his employers previous to the date of the accident, viz

B. Where death resulted from the injury,

(a) The said A B was at the date of the accident years of age

(b) He was employed as , and his average weekly earnings computed in accordance with the above mentioned Act were

(c) He left the following dependent wholly dependent upon his earnings, and the following dependant partially dependent, viz

Here state dependent wife then widow up to the deceased, and provide that the law and the order shall have been deposited

or He left no dependant wholly dependent upon his earnings, but left the following dependant partially dependent, viz

Here state dependant, who then widow up to the deceased, and provide that the law and the order shall have been deposited

(d) The following payment were made to the said A B after the accident, viz

We William L. Seffe, William Cecil Smyly, Robert Woodfall, Thomas C. Granger, and H. Thosd Atkinson being the five judges of the County Court, appointed for the making of Rules under section one hundred and sixty four of the County Courts Act 1888 having made the foregoing Rules of Court pursuant to paragraph twelve of the Second Schedule to the Workmen's Compensation Act 1906 do hereby certify the same under our hands and submit them to the Lord Chancellor accordingly

Signed W. L. Seffe
W. C. Smyly
R. Woodfall
T. C. Granger
H. Thosd Atkinson,

I allow these Rules

Signed Lord Chancellor, C.

The 21th November 1908

MEMORANDUM

Rule 1. The proposed additions are intended to make it clear that Rule 33 as to the appearance of parties to arbitrations, applies to all arbitrations under the Act, and further provides that dependants of

a deceased workman may be represented by an officer of a society with which the workman was connected.

Rules 2 and 4 are suggested to meet a difficulty which is experienced by registrars to whom agreements are forwarded for registration under Schedule 2 paragraph 9 in obtaining information to enable them to judge whether such agreements may properly be recorded, and they provide that the memorandum of an agreement shall contain such information. For this purpose Rule 2 provides that the memorandum shall state in the case of a workman his average weekly earnings and his compensation to compensate for work, and in the case of a deceased workman his average weekly earnings and particulars as to his dependants, so that the registrar may be able to form an opinion as to whether a lump sum agreed to be paid in redemption of a weekly payment, or the amount of compensation agreed to be paid to dependants is adequate or not.

Rule 4 amends Rule 19 by providing that it shall be the duty of the parties to an agreement to furnish such information as may be required by the registrar, and by providing that where a reference to the judge is rendered necessary by the refusal or neglect of any party to furnish information reasonably required by the registrar, such party may be ordered to pay the cost of an inquiry by the judge.

A form of inquiry which may be used in such cases is here annexed. It has been found to be of use in producing the necessary information.

Memorandum

From _____ To _____
The Registrar _____
County Court _____

1901

The Workman's Certificate of Payment

The Registrar will be obliged by your informing him either by letter or at a personal interview here the nature of the accident, the duration of the total or partial incapacity for work, and any facts you may desire to bring to his notice as to the circumstances leading to the agreement as to the amount of the compensation.

Rule 3 is suggested in order to secure uniformity of practice. Some registrars require the original agreement to be produced when a memorandum is filed and claim to return it, a practice to which insurance companies object, as the original agreements are often required as vouchers for payment or for purposes of audit, and a

question has also arisen as to whether a memorandum of agreement may be lodged by insurers.

The Act only requires a memorandum of an agreement and not the original agreement to be recorded though no doubt the original agreement which is the best evidence may be filed. It is submitted that where a memorandum is filed, the registrar may properly require the original to be produced to satisfy himself that it has been duly executed but that he may well be satisfied on this point by the assurance of a responsible person and that where a memorandum is filed the registrar is not entitled to retain the original agreement. It is further submitted that memoranda of agreements which are generally entered into by insurers on behalf of the employers may properly be filed by insurers on behalf of the parties interested and the draft additions to Rule 12 have been framed in accordance with these submissions.

Rule 1. See note to Rule 2.

Rule 5 is suggested to enable application under Rule 78 for the variation of orders to be made on behalf of infant dependants by next friends in cases where the interests of the mother and the infants may be conflicting.

Rule 6. Cases arising under the Act of 1906 often resolve themselves into questions of medical evidence as to the condition of the injured workman and where there is any dispute as to his condition expert witnesses are habitually called. There is no power under the Rules to allow the costs of advising on evidence or fees to experts unless costs are allowed on Scale B and many cases occur in which the court is not disposed to allow costs on that scale but is met by the difficulty that if the costs of advice on evidence and qualifying fees to a medical man are not allowed the whole amount of compensation allowed will be swallowed up by such costs if they have to be borne by the workman. To meet this difficulty it is suggested that power should be conferred to allow such costs where costs are taxed on Scale A as an alternative to allowing the whole of the costs on Scale B.

Rule 7 applies Rules 7 and 33 as to persons under disability and partners and as to the parties by whom parties to arbitration may appear to all proceedings under the Act and rules those rules being at present limited to proceedings by way of arbitration. The suggested amendment would enable persons interested in infant children to apply to the court under Schedule 1, paragraph 9 for the variation of orders or awards as to the apportionment of compensation.

November, 1908.

ADDITIONAL INDUSTRIAL DISEASES BROUGHT
UNDER THE ACT

H. D. Dwyer,
Whitehall, S.W.
1908.

SIR,

With reference to the Home Office circular letter to Certifying Surgeons of the 29th June 1907 on the subject of the application of the Workmen's Compensation Act, 1906, to cases of industrial disease, I am directed by the Secretary of State to say that he has made a further Order dated 2nd December 1908 under sub-section (a) of section 8, which adds to the list of diseases in respect of which compensation is payable two additional diseases, namely catarrh in glassworkers and telegraphists' camp.

In the case of a workman disabled by glassworkers' catarrh who has been employed in processes in the manufacture of glass involving exposure to the fumes of molten glass, and in the case of a workman disabled by telegraphists' camp who has been employed in the use of telegraphic instrument, the disease is to be deemed to be due to the employment unless the Secretary of State or the employer proves to the contrary.

In the case of Post Office employees suffering from telegraphists' camp the application for a certificate of disablement is to be dealt with by the Post Office Medical Officer under whose charge the applicant is placed, and not by the Civil Service Surgeon.

The Order also modifies the description of the disease "eczema" in the previous Order as "Eczematous ulceration of the skin produced by dust or caustic or corrosive liquids or ulceration of the mucous membrane of the nose or mouth produced by dust." (See No. 1 of the List of Diseases in Schedule B of Table I in the Home Office circular of 29th June 1907) by the omission of the words "caustic or corrosive." The description now reads as follows: "Eczematous ulceration of the skin produced by dust or liquids or ulceration of the mucous membrane of the nose or mouth produced by dust."

For the purpose of statistics under the Act the Secretary of State is anxious to get data concerning particulars of the work done by Certifying Surgeons under section 8, and he will be obliged therefore if you will kindly fill in at the end of the year the enclosed Form and return it in the accompanying envelope.

To Factory Certifying Surgeons.

CHAPTER I

PRELIMINARY

THE right of a workman against his employer for compensation for injury sustained in the course of his employment has to be considered in three aspects :—

- (1) As it stands at common law ;
- (2) As the common law right is affected by the Employers Liability Act, 1880 ; (a)
- (3) As it is settled by the Workmen's Compensation Act, 1906. (b)

The relation of master to servant has been gradually changing during the course of legal history. At first a status, the position of a servant or workman then became the subject of contract pure and simple, with such incidents deduced, or perhaps added, as in the opinion of the Courts were the logical outcome of the relationship viewed as purely a contractual one. Lastly, the relation of master and servant has become a matter of State regulation, with a rapidly progressive tendency to restrain its contractual freedom by considerations of public duty and State policy. As connoting status the relation of master and servant need not concern us here.

(a) 43 & 44 Vict. c. 42. *

(b) 6 Edw. VII., c. 63.

Preliminary

Chap. I.

The common law, as we have to deal with it, is occupied with the development of the contractual view of the relationship. This reached its full expansion in *Wilson v. Merry*,^(a) and was more strikingly illustrated in *Howells v. Lambore Steel Co.*^(b)

Legislative Period

The passing of the Employers' Liability Act, 1880, marks the close of the first definite stage of the legislative period (a) in which a standard of duty independent of contract was gradually set up, while the Workmen's Compensation Act, 1897, was only the commencement of a system of compulsory restriction on the free relations of Capital and Labour, which admits of almost indefinite extension.

Relation of master and servant to persons outside the relation

The common law relation of master and servant to the outside world is peculiar in two respects. The master may sue a wrongdoer for the loss of the services of his servant caused by "a wrong or injury done to the servant in the course of his master's business",^(c) and, conversely, any one injured by the servant acting in the scope of his employment may make the master liable for the injury.^(d)

Apart from these peculiarities, persons holding the relation of master and servant stand to each other in the same position as they do to the rest of the community. If

^(a) 1 L. R. 180, App. 42.

^(b) 1 T. R. 100, Q. B. 14.

^(c) The limitation which is attached to the Employers' Liability Act, 1880, in respect of action for the loss of the services of the servant, is the 1 & 2 William IV. c. 40, and the 7 & 8 Vict. c. 15, the Factory and Workshop Act, 1878 (11 Vict. c. 16), and from the 1876 Vict. c. 91 through the 23 & 24 Vict. c. 151 to the Metropolitan Management Act, 1872 (35 & 36 Vict. c. 72) and other like special legislation.

^(d) 151 W. R. 1, *Atwood v. M'Kinnell & Co.*, 31 L. J. C. P. 292 at 297. The limits of the doctrine of *Atwood* are well indicated in *Factor v. Macleod*, 60, *Sheffield and Tinsmiths' Co.*, 1896, 11 Q. B. 181, and in *Mason v. T. J. Ry. Co.*, [1895] 2 Q. B. 387.

^(e) *Timmins v. London General Omnibus Co.*, 11 H. & L. 526. *Prosser*, 145. *Hoadly v. John Hoadly & Co.*, [1901] 1 K. B. 81, is an instance of an action for inducing a servant to commit a breach of contract.

Master and Servant

a servant personally injures any one outside his relation of service, the injured person has a right of action, (a) both for the damage and the insult, (b) as in any other case, and if a servant is injured he has his right of action wholly unaffected by his position as servant.

Chap. I.

Neither is there immunity amongst servants *vis à vis* of one another. servants liable to one another
Time, Pollock, C.B., in *Southeby v. Stanley*, 101 says that one servant cannot "maintain an action against another for negligence whilst engaged in their common employment", but the authorities for the other view preponderate, and it is clear that a workman has an action against a fellow-workman who injures him *vis à vis*.

The relation of a workman to his employer now-a-days relation of employer and workman at common law
at common law arises entirely from contract, and all those terms are to be read into the formal contract which are necessarily or ordinarily attached in the circumstances of the society in which the contracting parties make their agreement. For example, a workman on entering into a contract with an employer is entitled to assume, that the other party (the employer in this case) will perform his part of the contract with ordinary care and good faith. Hence it is that the workman is entitled to presume that the materials provided for him to work upon are not inferior to the average, and that the employer will exercise towards him, at least, ordinary care and diligence. On the other

(a) *Stephens v. Myers*, 10 C. & P. 361; *M. H. B. v. L.* With the latter case, see *per Pollock, C.B.*, in *Condon v. Turner*, 11 Q. B. 21 at 24, and the same learned judge in *Alcock v. A. L.*, p. 291, 4 Q. B. 36 at 40.

(b) This has been questioned by *per Lord Macaulay* in *Blair v. Currie*, 121 at 101, "it is not true that one man makes an other's servant liable to a personal suit, *in actus*." The doctrine is an unfortunate relic of a time when the standard of negligence was higher than now, and the doctrine has been somewhat affirmatively preserved, yet the principle injured must have been a common law principle of *negligence*. See *Cochey*, 100 (21 Feb. 1891), n.

(c) 1 H. & N., 217 at 220.

(d) *Per Pollock, B.*, *Swindon v. N. P. Ry. Co.*, 11 Q. B. 311 at 314, *Wharton, Negligence* (2nd ed.), 245.

Preliminary

Chap. I. hand, the employer is, at common law, entitled to presume that the competent workmen, whom he has engaged to work together, will neither negligently nor wilfully injure one another; and to conduct his business on the footing that a pure accident will not affect his responsibility to them.

Now detailed The ground of these views is that, so long as the relation between master and servant is the subject of contract, the ordinary rules governing the interpretation of contracts must apply to them; and these rules assume a contract with a knowledge of all ordinary circumstances and surroundings. So soon as one party to the contract knows and the other is ignorant of any circumstance which alters the conditions of the contract, it becomes his duty to communicate the fact to the other, and if he fails in his duty, the other may treat him as if the contract had been made expressly to exclude the person who is ignorant from responsibility in respect of such circumstance. For example: if the master discovers a defect in the machinery used on the work, of which the servant is ignorant, and does not either inform him of the defect or remedy it, the master is liable for any accident arising from it, but if the master is ignorant and the servant knows, then the servant is held to take the risk arising from the defect. If both know, and the working is continued without comment accordingly to the latest decisions, (a) which considerably modify what was once held to be the law, (b) the workman is not to be held to undertake it unless—

(1) In addition to knowledge of the risk he is shown

(a) *Smith v. Baker*, 1891 A.C. 325, applied in *Wilburn v. Birmingham Battery and Metal Co.*, [1891] 2 Q.B. 778.

(b) Up *Speake v. Lord Bramwell, Munkley v. G.W. Ry. Co.*, 14 App. Cas. 171 at 186, *Slipp v. Lancashire & Yorkshire Ry. Co.* (1853), 9 Ex. 251, followed in *Pollock v. Langland*, L.R. 2 Q.B. 43. See for the principle on which a rule of law is established *Hobbes, The Common Law*, 123; *Groves v. Fether*, 1 T.L.R. 473. *Post*, 24, 37.

Thomas v. Quartermaine

to have appreciated or had the means of appreciating its danger, and

Chap. I.

- (2) So conducted himself as to warrant the inference that he undertook it. In fact a new contract must be inferred. The old cases are no longer of authority.

To the purely contractual notions that prevailed in the middle of the last century has lately been brought again into prominence the notion of a State duty to regulate the conditions of labour. The relation of workman and employer has been lifted from its place in the ordinary law of contracts, and arbitrary incidents have been attached to it, with the political object of improving the position of the workman, and may be of awakening or concealing his sympathies. The Employers' Liability Act, 1880 adopted the means of adding advantageous implied obligations to the contract. The Workmen's Compensation Acts have gone in a different direction, and essayed to improve the position of the workman by compulsory regulations of the terms of labour, and the imposition of terms to contracts of service which must result in a general system of insurance. They proceeded on the theory that one making a contract undertook the natural and obvious risks of the situation, that *volenti non fit injuria*. The decision in *Thomas v. Quartermaine* made the first incision into what till then had been settled law: that the *onus* of showing that the workman did not undertake any particular risk incident to his contract of employment; and did it by emphasizing a scholastic subtilty which must have been very congenial to Bowen, L.J., who revived it: "The maxim be it observed is not *sciret non fit injuria* but *volenti*. It is plain that mere knowledge may not be a conclusive defence. There may be a perception of the existence of the danger without

Chap. I. comprehension of the risk." This only goes to affirm that the presumption of the common law is not irrebuttable, but that where the facts point to knowledge as the fair presumption, the workmen may give evidence to show that it is not the true one. The House of Lords, however, in *Smith v. Baker*, went far beyond this position.*

Smith v. Baker. This illustrious body in its judicial capacity has frequently shown its susceptibility to considerations of policy if not of politics, and it did so notably in the case of *Smith v. Baker*, which in its facts raised exactly the point that had been treated as settled law since *Skipp v. Eastern Counties Ry. Co.* A workman was exposed to a danger of the employment but outside the immediate object of his own work—in one case the running of periodic trains; in the other, the swinging overhead of huge stones at the place where he was engaged at work. The dissenting speech of Lord Bramwell expresses beyond a doubt in the writer's opinion what was the common law doctrine up to this point. But the House of Lords decided that "the mere fact that he [the workman] undertakes or continues in such employment, with full knowledge and understanding of the danger, is not conclusive to show that he has undertaken the risk." So far this is mere iteration of the old law, but, to quote the words of Lord Herschell, (a) "it must have been a question of fact and not of law whether the plaintiff undertook the employment with an appreciation of the risk." The interpretation of this clause is given by Romer, L.J. "It is no sufficient answer to the *prima facie* liability of the employer (b)

(a) 1891 A.C. 325 at 367.

(b) It may be worth while to note that this is the exact opposite of what had hitherto been held to be law. There was no "*prima facie* liability of the employer." *Res ipsa loquitur* does not or did not, apply as between master and servant. The cases demonstrating this conclusion are collected in *Labatt, Master and Servant*, 2238. Probably sufficient of

to show merely that the servant was aware of the risk and of the non-existence of the precaution which should have been taken by the employer, and which, if taken, would, or might, have prevented the injury. Whether the servant has taken that upon himself is a question of fact to be decided on the circumstances of the case." Chap. I.
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This has since been adopted as the modern law. The way it works out is, the master has now to probe into the man's mind to find his intention in taking the work, he has to give the man's reason for working, and his action is not even *prima facie* evidence of his intention. Reliance can no longer be placed on what he does, for a jury is to find what he thinks, and is hampered by no logical obstacles in doing so. (a)

The object of this book is to trace the growth of the law of workmen's compensation through these stages, and to present a view of the law as it stands to-day. Scope of the book

Before setting out, it is expedient to define certain terms, terms which we must frequently use.

The substitution of the words **Employer** and **Workman** for the words familiar to the common law, **Master** and **Servant**, serves to illustrate rather a social than a legal change. The use of the term workman promotes the performance of work, that of servant submission to control; while the term employer points to the providing of work, that of master to the exercise of control. In law they are practically synonymous. (b)

Employer and
Workman.
Master and
Servant.

them to bear out the proposition are quoted, *Bayo v. Nield* (1861), 130.

(a) Adapted from an article by the author in the *Journal of the Society of Comparative Legislation* (N. S.), No. XVIII, 1895.

(b) It may be interesting to note the transition from the legislative use of one phrase to the other. The Master and Servant Act, 1867 (31 & 32 Vict. c. 14), is the last of a long series, as may be seen from the schedule, where the term master and servant is employed. The Employers and

Chap. 1. A **Master** is one who not only prescribes to the work-
Master. man the *end* of his work, but one who may direct the
 means also; who "retains the power of controlling the
 work" *a*. He who works on these terms is a servant; for
 whose acts, neglects and defaults the master is liable while
 he is engaged on matters conning to bring about the
 completion of the work *b*.

Servant A **Servant** is a person subject to the command of
 his master as to the manner in which he shall do his
 work *c*.

The relation of employer and workman does not connote
 actual employment. "It is not those only who are actually
 called upon to perform duties, but those who are under an
 obligation to perform them who are employed."

Employ **Employ** in relation to a servant means "hire" or
 "keep in a service," and does not necessarily imply that
 the master is bound to supply the servant with any particu-
 lar work whilst the relation subsists, *d*.

Workmen Act 1875 (38 & 39 Vict. c. 96) in the definition of the new
 nomenclature.

(a) *Crompton v. Sedley & Hardwick*, 11 L. R. 570 (1878).

(b) *Lampson v. London General Omnibus Co.*, 11 L. R. 429.

(c) *Hoare v. Baines*, 11 L. R. 100 (1876). See also *W. D. & H. O. Wills v. W. D. & H. O. Wills*, 11 L. R. 100 (1876).

(d) *Per Partick, B.*, *Emmens v. Tabor*, 11 L. R. 100 (1876), per *Crompton*, J., at 612, *per Turner*, J., *Emmens v. Tabor*, 11 L. R. 100 (1876). In *Phillips v. Almond Palace Co.*, 1901 1 K. B. 201 (1901), it was held that where a contract of employment is not of such a personal character that the part of the partnership is to be put an end to by the death of the deceased partner it could be enforced by the surviving partner. That it was held that the law holds on the existence of the obligation is dependent for its basis on the personal element. *Tasker v. Shepherd*, 11 L. R. 575 (1878). *Robson v. Drummond*, 2 B. & A. 203. In his judgment in *Phillips v. Almond*, at 61, *Kennedy, J.*, cited *Lindley*, *op. Partnership*, 6th ed. p. 297. "If a person enters into a contract with a firm and that contract is of a purely personal character to be performed by the individuals who have entered into it, and not by any one else, a change in the firm may operate as a dissolution of the contract, so that neither the new nor the old partners can sue in respect of any alleged breach which may have occurred since the change took place." *Hunt v. Hunt*, 11 L. R. 221 (1876). "A contract made with a partnership respecting matters connected with

If, however, wages are to be paid in the form of commission a contract is impliedly created to find work. (a) Chap. I.

Whatever a man does in the course of his master's employ, *quod, modo, ubi, rebus, quibus*, the master is responsible for, even if the man is leaving his work without excuse (b)

A Contractor for work is not a servant. "If there is a contract between them" *i.e.* an employer and a workman "so that the person doing the work, or doing the act complained of, has a right to say to the employer, 'I will agree to do it, but I shall do it after my own fashion, I shall begin the work at this end, and not at the other,' then the relation of master and servant does not exist, and the employer is not liable. But if the employer has a right to say to the person employed, 'You shall do it in this way, that is to say, not only shall you do it by virtue of your agreement with me, but you shall

partner before me," is generally a contract is applicable to the ordinary partner before me, and is limited to a question of choice of the partner before me, and is limited to a question of choice of the partner before me. In *Turner v. Goldsmith*, 1891 1 Q. B. 411, O'Brien v. Nelson, 1903 2 K. B. 287, 1904 2 K. B. 116, 1905 1 A. C. 106, *Donaldson v. Russell & Son*, 1906 2 K. B. 728. See, however, *Southey v. Tredwell*, 1877 L. R. 648, following *Rhodes v. Forwood*, 1 App. Cas. 256.

(b) *Hydon v. Stewart*, 2 Macq. (H. L.) 30.

Chap. I. do it as I direct you to do it,' there the law of master and servant applies, and the master is responsible." (a)

Agent. An **Agent** is not a servant. An agent is allowed more or less discretion, while a servant is, as a rule, bound to obey specific orders. Thus, the publisher is the mandatory or agent of the author in printing a book, the compositor is the *locus* or servant of the printer in setting up the type. A trustee is the mandatory or agent of his principal in investing the latter's funds, the trustee's clerk, who keeps his account, is the trustee's *locus* or servant. A contractor undertaking to build a house for an capitalist is the capitalist's agent, the mason or the bricklayer who directly lets his labour is a servant.

The servant binds the master so long as he acts for the advancement of the master's business (b).

A contractor or an agent does not affect his principal with liability unless his act is done in the necessary or usual conduct of the work (c).

Scope of authority.

An act within the "scope of the authority" of the servant comprehends any act which may be considered as having resulted from the performance of the duty entrusted to the servant, or to have been undertaken by him with that end in view, and especially if in doing

(a) Per Bramwell, L. J., *Moses v. Fisher* (on Turner's Liability, Parliamentary Paper, 1869, vol. 1, p. 88). Mr. Stowart, *Industrial Democracy*, 2nd ed., vol. 1, c. 10, p. 107, cites *Stewart v. American* in support of the following.

An employer is a person who, in the pursuit of an independent business, undertakes to do specific work with other persons without committing himself to their control in respect of the details of the work. *Per*, 109.

(b) Per Willes, J., *Barwell v. The Fish Joint Stock Road*, 11 Q. B. 229 at 236, and also per Bowen, L. J., *British Mutual Fidelity Co. v. Phoenix-wood Loan & Ry. Co.*, 18 Q. B. D. 711 at 717, and *per* 712, and so on. In *Halliday v. Leach*, 18 Q. B. D. 341, Kerwick, J., held that the proposition in *Stewart v. Fisher*, 10 Q. B. D. 341, that there must be some wrong or omission on the part of the agent in order to make him personally liable in respect of a contract made in the name of his principal, is corrected by *Collier v. Wright*, 8 L. R. B. 647.

(c) *Per* Erle, J., *Hughes*, 8 App. Cas. 413.

the act⁶ he were acting for his master's benefit and⁷ not for any purpose of his own. (a) Chap. I.

The question whether acts of the servant are within the scope of his authority is for the jury unless they are of a nature which manifestly cannot be so; when the judge will nonsuit (b)

Common Employment—When “servants are set<sup>Common emp-
ployment</sup> of the same master, (c) and where the service of each will bring them set at to work in the same place and at the same time” (and on the same system of working) “that the negligence of one, in what he is doing as part of the work which he is bound to do, may injure the other whilst doing the work which he is bound to do,” such service is in a common employment (d)

In all cases the immediate instrument of physical injury must be contiguous to the person injured, and in most cases the person who causes physical injury is not far from the person to whom it results. But I suppose that the signalman at one end of a rifle range is clearly in common employment with the marker at the other, when the two have a common master, and to give a stronger instance, a servant who unskillfully packs dynamite in a factory, and another who is unpacking it at a distant warehouse is injured by its explosion, are clearly in a

(a) *Per Williams, J.* *Thompson v. London General Omnibus Co.* 11 H. & C. 523 at 540. *Stoddart v. Ashton* (1869), L. R. 1 Q. B. 450, per Cockburn, C.J., at 479. “The contract of a servant is to do his master’s business, an obligation to command is to do his.” *Thompson v. Motor* (11 L. Sc.) 124 at 132.

(b) *Hickley v. N. W. Ry. Co.*, 1895 107 B. 122.

(c) *Johnson v. Fildes*, 1891 A. C. 371 (Common v. Newton, 1893) A. C. 408. *Post*, 12.

(d) *Smith v. Baker*, 1891 1 A. C. 413 at 416 and 417.

(e) *Charles v. Taylor*, 4 C. P. 10 192 at 196.

common employment.^(a) On the other hand, mere contiguity, as unusual or accidental, would not be consistent with common employment.^(b)

The question comes to this: Did the one servant know or have reason for knowing that the employment of the other servant was incidental to his own employment? (c)

Fellow-servants are all those who are engaged in a common employment under the same employer, who either themselves come into contact during the progress of the work, or whose work is so performed as to subject to risk others engaged in the same employment and under the same employer, even though the work from which the risk arises is done in some other place than that in which the risk is encountered, or before the person so affected by it was engaged in the service. (17)

[illegible][illegible] (c) Mean | Value of North Ry Co., Ltd. | Burgess | P. 12 |

(6) *Wilson v. Merry*, 1 R. R. Supp. 126, explained in *Johnson v. Landau*, 1890 A. L. J. 371. A tenderer appointed under a statutory obligation and performing statutory powers at law need not from an ordinary contract. *Howells v. Edwards*, 1890 A. L. J. 100. R. R. 10 Q. B. 12. The captain of a ship and the subaltern fellow-crews, *Howells v. Paine*, 1890 A. L. J. 380. *Stratford v. Paine*, 1890 A. L. J. 380. *Smith v. Steph*, 1 R. R. 10 Q. B. 125, and is the relation between the owner and the pilot on a non-technical and general Steam Navigation Co. Ltd. and Colonial Steam Navigation Co. Ltd. 1 R. R. 125. 238. In

Duty in law is the correlative term to **Right**, and Chap. I.
 signifies that which a person is bound by legal obligation Duty and Right.
 to do or forbear with reference to some other person or
 persons. The word "Duty" is most commonly used to
 indicate obligations imposed by law, and is generally
 applicable and not those undertaken by contract, which
 are special in their obligation. (*a*)

The most general expression of the notion of duty is
 that of Binnewell, 114: "That duty which the law imposes
 on all, namely, to do no act to injure another," (*b*)

"**Default** is a purely relative term, just like negli- 1860
 gence. It means nothing more, nothing less, than not
 doing what is reasonable under the circumstances, not
 doing something which you ought to do, having regard
 to the relations which you occupy towards the other
 person interested in the transaction" (*c*)

Wagoner v. L. S. Ry., 101 Fed. 841, 340, 100 L. Ed. 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

(a) Per Lord Justice Coleridge, 114: "The duty of a man to do what is morally right, and to do what is legally right, are two different things. The duty of a man to do what is morally right, is a duty which may be imposed on him by the law of God, and which may be imposed on him by the law of man. The duty of a man to do what is legally right, is a duty which may be imposed on him by the law of man, and which may be imposed on him by the law of God." (*b*)

(b) Per Lord Justice Coleridge, 114: "The duty of a man to do what is morally right, and to do what is legally right, are two different things. The duty of a man to do what is morally right, is a duty which may be imposed on him by the law of God, and which may be imposed on him by the law of man. The duty of a man to do what is legally right, is a duty which may be imposed on him by the law of man, and which may be imposed on him by the law of God." (*c*)

(c) Per Bowen, L. J., 114: "The duty of a man to do what is morally right, and to do what is legally right, are two different things. The duty of a man to do what is morally right, is a duty which may be imposed on him by the law of God, and which may be imposed on him by the law of man. The duty of a man to do what is legally right, is a duty which may be imposed on him by the law of man, and which may be imposed on him by the law of God." (*d*)

Chap. I.

Negligence.

Accident.

Negligence is "the absence of such care as it was the duty of the defendant to use." (a)

Accident is an occurrence which "could not have been avoided by the use of the kind and degree of care necessary to the exigency and in the circumstances" (b). In this sense the term connotes "Act of God." (c)

Test.

Two tests, applicable in ascertaining whether an occurrence is an accident or not, are -

(a) *Per Willes, J.* *Griffin v. General Insurance Co., Ltd.* 11 P. 600 at 612. In *Griffin v. P.* at 420 the principle is implied. Willes, J., points out that the "conclusion has not been reached that negligence is a positive instead of a negative word." *Id.*, p. 611.

(b) *Per Shaw, C.J.* *Brown v. Kendall* 10 M. 292 at 296. *Per Lord, L. B. & S. C. Ry. Co.* 1896, 2 Q. B. 248. *Lord v. General Insurance Co., Ltd.* 11 P. 281. *per Bramwell* at 299, *per Lord* at 300. *Accident Insurance Co., Ltd.* 2 Q. B. 154. "Accident is not actionable." *Baylis v. Saunders*, 2 Chitty, 639. *Waldman v. Robinson* 11 B. 213. "Inevitable accident" has been defined as "an occurrence which has taken place in such a manner as not to have been capable of being prevented by ordinary skill and ordinary diligence." *The Thomas Bewick v. The Tank*, 2 Mar. Law Cas. 411. See *The Mure v. L. B. & P. Co.* 21 Q. B. 220, and *The Selwan*—*The Albion*, 11892 P. 149. The word "inevitable" thus merely emphasises the primary meaning of a "fortuitous" and distinguishes it from accident in its secondary sense. "An accident is that which happens without the fault of anybody." *per Brett, J.* *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* 10 Q. B. 530.

(c) *Per Nugent v. Smith*, 11 P. 1121. *Nitro Phosphate Co. v. London & St. Katharine Docks Co.* 9 Ch. D. 503, *per Fry, J.* at 515. *Smistod v. Maritime Insurance Assurance Co.*, 1 L. T. (N. S. 11), as "we cannot think the case produced by the action of a known natural agent can be considered accidental." "By the term accident . . . some violence, casualty or contingent occurrence is implied." Falling into a river during an epileptic seizure was held an "accident" in *Windsor v. Accident Insurance Co.* 6 Q. B. 112. So was falling under a train in *Lawrence v. Accident Insurance Co.* 15 L. J. (N. S.) 29. See also *Reynolds v. Accidental Insurance Co.*, 22 L. J. (N. S.) 29. *South Staffordshire Tramways Co. v. The Solihull and Accident Assurance Association, Ltd.*, 1891 1 Q. B. 402, and *Stewart, Medical Dictionary, s.v. case*. *Post*, 316. In 80 Law Magazine (5th series) 139, Aug. 1, 1900, there is a valuable paper read before the Medical Society of London entitled "Definitions of Accident, Fortuitous, and Accidentally" by Mr. Stanley Atkinson of the Inner Temple, where there is an apparently exhaustive classification of the cases under the three words defined, and a consideration of them that should be of the greatest value to resort to in any case of difficulty. There is also a note to *Paul v. Traverses Insurance Co.*, 8 Am. St. R. 763-766. "What is death by accidental means?"

- (1) Was the result contemplated? Chap. I.
 (2) Was the result the ordinary and natural sequence •
 of the course of action preceding it?^(a)

The word "accident" is used also with a secondary meaning, in which it signifies an occurrence following on previous default or negligence.

(a) See *Stephens v. Fisher*, 11 B. Monahan & Crown Accidental Insurance Co., 1891 112 B. 750 at 754. In this case plaintiff sought a verdict setting down a ledge expected to put it up, and in doing so was killed by it. The injury was held to be an accident within the terms of an insurance policy. *See also* *Accident Insurance Corporation v. East*, 1900 11 K. B. 487 where injury to the insured's house was the result of a defect in the chimney and therefore held not to be an accident. *See also* *Easton v. Easton*, 1900 11 K. B. 487.

CHAPTER II

THE POSITION OF THE EMPLOYER AND HIS WORKMEN AT COMMON LAW

PROPOSITION I

THE duty of an employer to his workpeople must be ^{the duty of} determined by reference to all the circumstances of time ^{employer to} ^{workman} and place, and of the ordinary habits and safeguards in working in the employment. A custom to be negligent is not valid in law.

A particular kind of fault or both well known to be influential ^{illustrations} was kept without incident happening for a long time in proximity to an engine which could spark. At last an accident occurred, and it was contended that the persons knowingly selected an area of Smith. But the common law is not to be used to prove the existence of a rule of law.

The over machine is a machine which is often found and the engine has a very long history. It is one of the many companies which are charged with the duty of preventing injury to men on the engine. Since the law is generally considered to be a machine without all roads, there is no default in continuing a method not known to be negligent.

(a) *Thompson v. Great Western Railway Co.*, 10 Q.B. 16, 411.

(b) *Hunt v. Great Western Railway Co.*, 21 Q.B. 14, 15, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Liability at Common Law

Chap. II. An employer who provides machinery fit and proper for his work and takes measures to have it superintended in a fit and proper manner, has discharged his duty *(a)*

PROPOSITION II

**Employer not
liable for
ordinary risks**

An employer is not liable for damage caused to his workmen through the ordinary risks of the employment or through the default of fellow-workmen

Illustrations

A railway company agrees with a contractor to shunt their trucks upon their line, and to supply horses and men for that purpose: if the company have boys at hand they are to supply them; if not, the shunting, when they have not the shunting engine, they are concerned, is to be done without boys. Shunting is a dangerous work, and is often done without assistance. A workman had been severely injured in the course of the contractor shunting one time with, and one time without boys. When shunting without assistance he repaired the engine and ran against the railway company. He cannot recover, since he undertook the risk *(b)*

A contractor agrees with a railway company to do work in a dark tunnel while the ordinary service of trains is running. No precautions are taken, and a workman of the contractor who had been working

(a) *Wernius v. Mathieson* (1 Macq. 611, 8 126, per Lord Westbury, at 227. In an American case it was held that a proposition of law that the owner or employer must furnish tools and machinery is conclusively safe and adequate for the purpose of performance was required of him. He is not required to adopt every new piece of machinery, but is not required to adopt the very best and ablest improvements for that would break up almost every establishment in the country. Everywhere new improvements are constantly being made, new machines invented. When they become generally used, when they are generally adopted, then it is the duty of the employer to use them. But until the adoption of the machine becomes common, until the new scheme becomes general, until they are in general use to a sufficient extent to render it necessary to the man using such a machine, they are not required to adopt every new invention." *Iron Shipbuilding Works v. Nuttall* (1895) 119 at 120. *Cp. Baddeley v. Earl Granville*, 19 Q. B. D. 123.

(b) *Stamberg v. G. W. Ry. Co.*, 11 App. Cas. 179. The position of a man loading or unloading heavy packages is considered in *Wilson v. United-Man Ry. Co.*, 37 sc. L. R. 235.

there a fortnight is injured by a passing train. The Court of Appeal held that he cannot recover.

Chap. II.

A miner is being drawn up from the pit in a cage. A fellow-workman fails to stop the cage as soon as the cage arrives at the platform. The cage is in consequence overbalanced, and the miner is killed. The accident is due to risk of the employment.

A watchman is employed to attend to engines at his employer's power. When on the job, preparing for his usual duty he is summoned by the manager to the office to reach which he has to pass through a narrow and crowded street. While crossing he is knocked down by a truck of petrol which is being hauled from a warehouse to a brick-yard by the engine. The accident is due to the carelessness of one of the men of the company employed leaving the rope by which the truck is hauled from the warehouse. The accident is due to the employment.

A butcher directed by his employer to load meat in a certain place of the premises entered the van loaded down and the servant is injured. The accident is due to risk of the employment.

A person on the employer's premises is injured by a machine owned by another person, the other employee, but engaged in different duties and while they are both employed. He cannot recover.

PROPOSITION III

An employer must safeguard his servant from ^{the} But liable for personal default employer's own personal default.

and Woodbridge v. Woodbridge (1891) 15 Q.B. 381. This and the preceding cases are in line of authority though not exact. The master but cannot recover. *McIntyre v. McIntyre* (1891) 15 Q.B. 381. The case on the principle of the last case is *McIntyre v. McIntyre* (1891) 15 Q.B. 381.

(a) *Barton v. Mitchell* (1891) 15 Q.B. 381, 1891, 15 Q.B. 381.

(b) *Lowell v. Hewitt* (1891) 15 Q.B. 381.

(c) *Price v. Price* (1891) 15 Q.B. 381.

(d) *Hutchinson v. York, New and General Electric Co.* (1890), 5 T.L.R. 314. See also *Farwell v. Boston and Worcester Ed. Corporation*, 15 Mass. 49 (1844), 15 Q.B. 381. In *McIntyre v. McIntyre* (1891) 15 Q.B. 381, the Court held that the fault of a fellow-servant would not allow the plea that the injury was the fault of a fellow-servant, unless the name of the fellow-servant was made out, but the Court reversed his decision. *Smithwhite v. Moore & Sons*, 14 T.L.R. 461—the case of a cut arm while cleaning windows, through cracked glass.

Chap. II.**Illustrations**

One of two partners, owners of a coal mine, acts as manager of the mine. Though the shaft being hastily constructed a collier is injured. Both the partners are liable for the default of one (*a*).

An employer goes with a lighted candle to detect an escape of gas. Before the gas is turned off at the meter an explosion results and the servant is injured. He is entitled to recover against the employer (*b*).

PROPOSITION IV**Personal default,
how understood**

The duty of an employer to guard against personal default, besides including the case of actual physical interference with work, also cover the cases—

- (1) Where machinery, tackle or material supplied for the purposes of the work is insufficient, or the general arrangement of the work is defective.
- (2) Where incompetent workmen are employed.
- (3) Where there is a neglect to observe statutory requirements.

Illustrations.

(A) A large stone is carelessly left on the roof of a mine so that it falls on workmen in the mine. If the circumstances are such that the mine owners must be taken to have known of the insecure condition of their works, they are liable for the consequences (*c*).

Men leave a mine without working as preliminary to entering on a strike. An accident happens in drawing them up, through defective tackle. The employer is liable for the injury (*d*).

A labourer is employed to erect a scaffold. The materials for the scaffold are in bad condition. The labourer breaks several of the pulleys

(a) *Mellors & Shaw* (1861), 1 B. & S. 437.

(b) *Warren & Willer* 11 L. & C. P. 601. See also 45, N. 1872, 87.

(c) *Paterson & Wallace* (1854), 1 Macq. (H. L. Sc.) 718. See *Potts & Plunkett*, 9 H. C. L. R. 230, cp. *Hall & Johnson*, 3 H. & C. 589.

(d) *Bydon & Stewart* (1855), 2 Macq. (H. L. Sc.) 30, cp. *Tunney & Midland Ry. Co.*, L. R. 1 C. P. 221.

on account of their being unsound. One of the employers tells him to break no more—that the putlogs would do very well. The labourer uses such as he thought sound. One of the putlogs he uses gives way, the scaffold falls, and the labourer is injured. There is evidence for a jury of the employers' liability. (a)

Chap. II.

A workman is employed at a stone quarry to manize a crane. Others are blasting rock. Notice of an explosion, but insufficient to allow of the crane worker getting under cover, is given by the blasters. He is injured. The detective system is to blame, and the employer is liable for the consequences of it. (b)

A workman employed drills holes in a rock cutting. Men employed in another department of the employers' work are simultaneously hitting stones by means of a crane men by. Stones are thus swung over the driller's head. One falls from the crane and injures him. With a good system of work this would not happen. There is fault in the employer. (c)

2) A boy is engaged by a farmer to whom complaints are made of his incompetence. No attention is paid to the complaints, and an accident happens through the boy's incompetence. The employer is not liable to the injured person for this since the farmer is not shown to be incompetent, and the incompetent boy is not engaged by the employer, who is not bound personally to appoint his servants. (d)

The remark may here be introduced that to render a master liable for the appointment of an incompetent servant there must be shown ^{incompetent servant.}

(a) Incompetency of the servant. (a)

A workman is employed in the care and management of a valuable printing press. Whilst so engaged a roller known as the "topper" jammed under the cylinder and did damage to the machine to the extent of £30. The accident occurred through the workman's carelessness to

(a) Roberts v. Smith, 2 H. & N. 213.

(b) Sward v. Cameron, 1 Danlop P.B. 3, approved in Lord Curzon's gift in Bartonshill Coal Co. v. Reid, 3 Mer. 111, 1 L. S. 126 at 280. See also Lord Stalk, 14 R. 1.

(c) Smith v. Baker, 1891 A.C. 325, sup. Macdonald v. London Coal Co., Ltd., 24 R. 504, McKillop v. North British Ry. Co., 24 R. 568, Smith v. Forbes, 24 R. 629.

(d) Smith v. Howard (1870), 22 L. T. (N. S.) 1130. Under the Employers' Liability Act, 1880, this is not so. s. 2, sub. s. 3. &c. also per Lord Cairns, Wilson v. Merry, 4 R. 18, 48 App. 326 at 432, Potts v. Port Carlisle Dock and Ry. Co., 8 W. R. 325, 2 L. T. (N. S.) 283.

(e) The onus changes on proof of incompetency of the servant. Skerrett v. Scallan, 11 R. 11 C. L. 389 at 401, Edwards v. L. & B. Ry. Co., 11 F. & F. 680, Sullivan v. Bennett Steamship Co., Ltd., Times newspaper, 10th August, 1898.

Chap. II. fix the end of the "screw" in the hole before starting the machine. The employer is justified in dismissing the workman for this single instance of forgetfulness, (c)

(3) Want of care by the master, (d)

A pointer is injured through a defective scaffold erected by a fellow-servant. The employer is not liable unless the person erecting it is shown to be incompetent and appointed without care, (e)

If Machinery is required by an Act of Parliament to be fenced so as to guard against danger to persons working at it. A servant enters upon an employment in connection with the machinery while it is fenced as required by the Act, and continues there after the fence becomes slackened down, and the employment dangerous. The servant complains. A promise is given to restore the fence. Nothing is done, and the servant is injured. The servant may recover, (f)

Machinery is required by Statute to be fenced in order to afford security to young people working in proximity to it. A positive enactment requires that when any part of the machinery is used by any manufacturing process it shall be securely fenced. Any person suffering injury through the breach of this enactment has a right to bring an action, (g)

A miner is killed through breach of a statutory duty imposed by the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76). His representative is entitled to recover, (h)

(a) *Baker v. London and County Produce Wharf*, 1891 1 Q. B. 901. *Id. before*, a single instance of incompetence in connection with neglect of duty as will warrant dismissal without notice. But an individual whose years of faithful service has shown him to be trustworthy, vigilant, and competent is not disqualified for further employment, and provided either incompetent or careless, and not trustworthy, by a single mistake or act of forgetfulness and omission to carry out the highest degree of caution and presence of mind. "The law could only take account of the time of every human being that the individual was capable of an act of negligence, forgetfulness, or error of judgment." *Baker v. New York & Bk. Co.*, 89 N. Y. 336. "The intermediate cases mentioned by Lush, Master and Servant, 690." *Op. Hale v. Kier*, 1908 2 K. B. 190.

(b) *Tarrant v. Webb*, 1871 L. R. 797 at 801, *The v. Budden and Belfast Junction Ry. Co.* (1879), 11 L. R. C. L. 206.

(c) *Tarrant v. Webb*, 25 L. J. C. P. 261.

(d) *Holmes v. Clark*, 6 H. & N. 319, 7 H. & N. 937. The distinction between a statutory and a common law liability is treated in *Button v. Great Western Colln Co.* (1872) 1 L. R. 715, 130 nt. 136. See *Ridd v. Bullock*, 19 R. 267 L. Sheriff v. Murdoch, 20 R. 727, *Kelly v. Globe Sugar Refining Co.*, 20 R. 839.

(e) *Cox v. Platt*, 6 Ex. 752, 7 Ex. 160, and 923. *Doel v. Sheppard*, 5 E. & B. 856.

(f) *Buddley v. Rut Granville*, 19 Q. B. D. 121. The reasoning of the judgments in this case is eminently unsatisfactory. So the rule formulated

PROPOSITION V

Where an employer works with his workmen, his liability for his personal defaults to them differs nothing from his liability to strangers or from the liability of one workman to another.

An employer acted in his own hand with One of the team *Illustration.*
 plies being loose. After he had been told of this it fell down the pit, and severely injured a workman. The employer is liable to the workman just as if the workman had never been in the employment of a

in *Clay v. Palmer & Co., Limited* (1901, 1 Q. B. 790). In *Emery v. Westhead* (1890, 1 Q. B. 120), a new paper test (before 1898, the proposition that negligence in machinery was limited to being caused by Strife) and from which neglect to fence an accident happens, is evidence of neglect of a common law duty (except to have been disputed, on the ground that by the Factory Act, 1878 and 1891, a penalty of £1000 imposed for the neglect, and that the penalty must be awarded to the person injured by the neglect). The objection in case of this sort is unavailing. And *de v. Smith v. Butler* (1891, 1 Q. B. 324), and *in Tate v. Latham & Son* (1897, 1 Q. B. 602). See now *Lacey and Worsnip v. A.C. 1901, 1 Q. B. 7, 221*, *per Lord Macnaghten*. To determine what is an adequate reason for neglect, and evidence of negligence, regard must be had to the state of knowledge at the time. If a particular precaution has not been hitherto known or need of it is not a defence, the omission of it is not negligence. For it is not a defence to any considerable extent that changes the case, and makes the omission a mere lapse of negligence. *per Lord Macnaghten* in *Blundell v. Lacey* (1901, 1 Q. B. 815, 283 at 286, and *per Lord Macnaghten*). When, then, there is no general obligation to fence machinery, but only a contributory duty, neglect to do so is simply *prima facie* evidence of negligence. *per Lord Macnaghten* in *Blundell v. Lacey* (1901, 1 Q. B. 815, 283 at 286, and *per Lord Macnaghten*). In *Holmes v. Clarke* (1901, 1 Q. B. 711, 714, 715), a dissent of opinion appeared. In *McGee v. Lord Wimborne* (1901, 2 Q. B. 102), the Court of Appeal held that where there has been a failure in the performance of an absolute statutory duty, there is no need for the plaintiff to allege or prove negligence on the part of any one in order to bring out his cause of action. In the *Mersey Welsh Fluoride Co.* (2 Q. B. 717), proof of a breach of a statutory obligation to fence machinery was held evidence of negligence, but it was further held that proof of such a breach of duty did not disprove the *prima facie* of it to set up a defence of contributory negligence. *per Lord Wimborne, supra*, *per Williams*, *6 Q. B. 419*, *at 419*, *per Lord Macnaghten*, *7 Q. B. 787*.

(a) *Ashworth v. Stanwin*, 3 Q. B. 1, 701. This case is distinguished in *Drew v. East Whitby*, 101 pp. *Can. 12 B. 107*, and is followed in *Loughran v. Peters*, 23 *Dunlop* 260. For the authorities in the latter portion of the proposition, see *anti*, 5.

Chap. II.

PROPOSITION VI

Deficient
supervision

An employer's duty is not discharged when he has appointed competent servants, and given them instructions to provide fit and proper machinery, if the employer might have known, by the exercise of reasonable care, that the machinery actually supplied is defective.

Instructions.

A contractor employs men on a work. The superintendence of the plant is the duty of the foreman. One of the workmen is injured through the fall of a scaffold-jack. The fall is caused through the rottenness of the end which had been in the earth years without examination. The contractor ought to have seen that the jack was in a fit state, and is liable for his breach of duty to

A workman is injured by the breaking of a chain used in the works on which he is engaged. Adequate inspection would have disclosed the defect. The employer is liable to

PROPOSITION VII

Improper
machinery or
tackle.

An employer is not liable for supplying inefficient machinery or tackle —

- (1) Where the workman enters on the service having the same means of knowledge of the danger or inefficiency of the machinery as the master;
- (2) Where the workman either expressly or impliedly undertakes to work under conditions of greater risk than the normal risks of the employment.

(a) *Webb v. Bennet*, 4 F. & J. 103. The principle at the root of this case is the same as that of *Turvey v. Ashton*, 1 Q. B. 1031. There is a duty periodically to examine things which tend to get out of condition. *Mann v. Scott*, 1890 1 Q. B. 484, is the case of a ship's charterer being held liable to a stevedore's labourer for an accident arising from a defective ladder. The duty to inspect is, however, very indistinctly stated.

(b) *Murphy v. Phillips* (1876), 35 L. T. (N. S.) 477. This case is distinguished in *Black v. Ontario Wheel Co.*, 39 Ont. R. 378, and in *Laurahurst v. Aldnamult Steamship Co.*, 22 L. R. 1r. 55.

(1) A sugar refiner employs a labourer in filling sugar moulds and hoisting them when filled to a higher floor in the warehouse. * Through motives of economy a cheaper way of turning the moulds than the ordinary one is adopted, an accident occurs, and the labourer is injured. The refiner's act may be voluntary, but does not subject him to liability if the workman knows as well as the employer the nature of the machinery he undertakes to use. *a*

A person employs another to carry a cask of mine acid but does not explain to him the dangerous character of his burden. The carrier trips, falls, and is injured by the acid. The employer is answerable. *b*

A dock labourer claims against his employers, alleging that on a door of a warehouse in the docks fell upon him and that the employers knew of its defective condition. In the absence of an allegation that the plaintiff was ignorant of the condition of the door, no ground of action is disclosed. *c*

A seaman enters upon service on a vessel that is unseaworthy and leaky. In consequence of the condition of the vessel the seaman suffers damage. In the absence of allegations that the shipowner knew of the defects, and that the seaman did not know of them, no cause of action appears. *d*

Statutory rules provided for fastening the rope by which mines descend into a colliery are habitually neglected. A fire occurs, by which the rope is injured. The bank man advises a miner to let the rope before descending by means of it. The miner returns to descend, the rope breaks, the miner is killed. He is the cause of his own death. *e*

(2) A railway company's staff is confessedly insufficient. One of their workmen continues at the work for three months till he is injured. He has no legal redress. *f*

(a) *Dymott v. Leach*, 26 L. J. Ex. 221. A similar decision would now be very difficult to obtain. See the note to *Williams v. Frough*, 11 L. & N. 258 at 259 on this case. *Asquith v. Moberg*, 2 H. & L. 565, 27 L. J. Ex. 156.

(b) *Parant v. Barnes*, 11 L. B. (N. S.) 533. See *Sutton v. Hockesworth* (1872), 26 L. J. (N. S.) 551 at 554, *Smith v. Dowell*, 11 L. & L. 238.

(c) *Griffith v. London and St. Katharine Docks Co.*, 13 12 B. 11 279.

(d) *Conner v. Steel*, 6 L. & B. 402.

(e) *Senior v. Ward*, 1 L. & L. 395. This case also is invariably "distinguished" when now cited. The reasoning in *Williams v. Birmingham Battery and Metal Co.*, 18, 19 2 12 B. 338, would now induce a different conclusion. There must also be a finding that the workmen undertook the risk.

(f) *Skipp v. Eastern Counties Ry. Co.* (1853), 9 Ex. 223.

Chap. II.

A workman is engaged in excavating a cellar. A wall has to be broken through and the earth taken out. The wall gives way, and the workman is injured. The injury is one of the work.

A porter is engaged in unloading or loading trucks. The trolleys are placed on a trolley. By reason of an increase in business and the use of larger trucks, the trolleys cannot be safely turned on the rails by a careful person. The porter attempting to turn one is struck by it and crushed. He has not taken the risk of the injury.

PROPOSITION VIII

Neglect of the workman to use the apparatus supplied.

Where an employer has supplied proper apparatus he is not liable to his workmen for negligence in its use.

Illustrations

A mine-sinker is working at the bottom of a shaft in which tubs are drawn to the top. He is asked to attach a tub to a rope which runs over a pulley at the mouth of the shaft. A pulley is provided to prevent the tub from falling back when unhooked. The pulley is not used. A tub falls and injures the mine-sinker. Liability for negligence is negligence of a fellow-servant.

PROPOSITION IX

Efficiency of plant.

An employer does not discharge his duty merely by providing machinery, tackle and material adequate at the outset of the work. He must provide during its continuance against their deterioration to any extent that may substantially increase the danger to the servant.

The master's duty is "to keep the machinery in the condition in which from the terms of the contract or the nature of the employment the servant had a right to expect that it would be kept."

(a) *Boydell v. Huggs*, 3 T. L. R. 618; *Osborne v. Rimmer*, 3 T. & T. 751.

(b) *Hiley v. Baxendale*, 6 H. & N. 115.

(c) *Griffiths v. Galloway*, 3 H. & N. 614.

(d) *Clarke v. Holmes*, 7 H. & N. 937.

The old cases must now be taken in their connection with the principle enunciated in *Smith v. Baker* (a). A workman cannot be held to have undertaken a risk unless he knew of its existence and appreciated or had the means of appreciating its danger, and the mere fact of his continuing at his work with full knowledge and appreciation will not of itself necessarily imply his acceptance, for it must have been a question of fact and not of law whether the plaintiff undertook the employment with an appreciation of the risk.

The presumption of the common law till the date of *Smith v. Baker* is abolished, and the defendant has to prove acquiescence on the plaintiff's part (which may never have passed his lips) to take the ordinary risks of the employment. The fact of working, in the circumstances, may not even *prima facie* prove of his having done so.

The principle is stated in *Williams v. Barton* (b) *Battery and Metal Co. v. B.* (c). If the employment is of a dangerous nature, a duty lies on the employer to use all reasonable precautions for the protection of the servant. It is by reason of breach of that duty a servant suffers injury, the employer is *prima facie* liable, and it is no sufficient answer to the *prima facie* liability for the employee to show merely that the servant was aware of the risk and of the non-existence of the precautions which should have been taken by the employer, and which, if taken, would or might have prevented the injury. In order to escape liability the employer must establish that the servant has taken upon himself the risk without the precaution. Whether the servant has taken that upon himself is a question of fact to be decided on the circumstances of each case.

Employers have control of a wall. A workman is engaged working *Illustrations.* on the wall, the condition of it deteriorate till it becomes ruinous and falls. There is a duty on the employer to prevent injury arising from the altered condition of the wall, of which they have cognizance, and they are liable for the accident (d).

A chain used in work is worn out. An accident results. The employer is liable for not having the chain periodically inspected (e).

(a) [1891] A. C. 513.

(b) [1899] 2 Q. B. 333 at 340.

(c) *Id.*, 9.

(d) *Vanghan v. Cool and Yonghal R. Co.* (1890) 42 L. R. 1, R. 297. For the Scotch case see *Wall v. Neilson* 15 R. 472, *Hodgkinson v. Curzon Co.*, 16 R. 633, and particularly *Milne v. Johnson*, 19 R. 830.

(e) *Murphy v. Phillips* (1876) 45 L. R. (N. S.) 477. There is a duty of inspection at suitable intervals, failing which an inference of negligence is drawn. If the chain has been properly inspected and breaks notwithstanding, unless there is something more in the evidence, there is no *prima facie* evidence of negligence.

Blackburn, J., thus states the law in *Fairy v. Ashton*, 1 Q. B. D. at 319

- Chap II. A scaffold-pole becomes rotten, breaks, and causes injury. The employer is in fault for not having it inspected. (a)

PROPOSITION X

Knowledge of dangerous conditions.

The knowledge of a workman of dangerous incidents or conditions of the work on which he is engaged is not by itself sufficient to preclude his recovering from his employer for injuries received therefrom.

Illustrations.

A defective rope is used in hoisting a cask. The employer promises to repair it, but does not do so. The workman continues to use it. The rope breaks, and a cask falls on the workman. The workman's knowledge does not constitute the employer's default. (b)

— The case of a lamp overhanging the highway which fell on a passer-by. "The employer would be bound to know that time after time the lamp will ultimately get out of order, and, as a consequence, there could be a duty cast upon him from time to time to investigate the state of the lamp. If he did investigate, and there were a latent defect which he could not discover, I doubt whether he would be liable, but if he discovers the defect and does not cure it or if he did not discover what he ought on investigation to have discovered, then I think he would clearly be answerable for the consequences." See *per*, 51. In *Batchelor v. Fortson*, 1112 B. D. 477, Smith, L. J., says on the question of whether there was evidence of negligence to leave to a jury where a chain broke in use, "We think that, though slender, coupled with the admission in the pleading that the chain was somewhat worn, it could not properly have been withdrawn from the jury." Mr. Hughes continues, *Employers' Liability*, 7th ed., 185, that the breaking of a chain by itself affords no evidence of negligence must therefore be qualified by the consideration that there is a duty periodically to examine the chain, or whatever the article is, if it tends to deteriorate in the lapse of time. The periods at which an examination should be held are, however, somewhat vague. The authorities are marshalled with his usual thoroughness by Mr. Lathatt, *Master and Servant*, 335-350.

(a) *Webber v. Renno*, 1 P. & F. 608, *Allen v. New Gas Co.*, 1 Ex. D. 251, so far as it is in conflict with this case must be considered not law.

(b) *Holmes v. Worthington*, 2 P. & F. 533. The Scotch case of *Crichton v. Ken*, 1 M. & G. 407, seems to be decided on a misapprehension of the facts in *Clark v. Holmes*, 7 H. & N. 937. *Fraser v. Hood*, 15 R. 178, follows *Crichton v. Ken*. In *Wilson v. Boyle*, 15 R. 162, the case is concluded by findings of the jury. See *Wilson v. Caledonian Ry. Co.*, 37 Sc. L. R. 285.

A workman's duty is to oil machinery dangerous if not fenced. When he enters the employment the machinery is fenced, subsequently the fencing becomes broken, and it is not repaired. The workman complains, but continues at the work. He is injured. He can recover from his employer. (c) Chap. II.

PROPOSITION XI

The knowledge of a workman of dangerous incidents or conditions of the work on which he is engaged, to preclude his recovering from his employer in respect of injuries received therefrom, must be knowledge actively present to his mind at the time of entering upon the work —*i.e.* knowledge combining both perception of the danger, together with comprehension of the risk. What is knowledge.

A driver is supplied by his employer with a vicious horse. He complains, but continues to drive it. He is kicked. His knowledge does not necessarily preclude his recovering against his employer. (b) Illustrations.

A workman is engaged in dulling a rock. Above him is a crane lifting stones. The position of the crane and the character of the work going on is apparent. His continued working in these circumstances does not shut him out from denying his acceptance of the risk. (c)

(1) A workman fell into an unfenced vat open to view, in a room in which he has been at work for many months.

(2) A builder is employed to mend the broken slate on a roof. He tumbles off.

(3) A bridge is in a dangerous condition. A person on the premises where the bridge is, is injured in consequence. Another workman is thereupon directed to repair the bridge, and his attention is called to its dangerous condition. In doing the work he is injured.

(a) *Holmes v. Clarke* 6 H. & N. 349, 7 H. & N. 937.

(b) *Yarmouth v. France*, 1912 B. 13047.

(c) *Smith v. Baker*, [1891] A. C. 325, *Williams v. Birmingham Battery and Metal Co., Ltd.*, [1899] 2 Q. B. 938, *Salmond, Torts*, 348, 359.

Chap. II.

In none of these cases can the workman prove: (a)

An engine driver who knows that another engine driver in his employer's service is incompetent is injured thereby. His knowledge is strong evidence of his assenting to take the risk thereof, but is not conclusive. (b)

A workman descending from an elevated tramway steps, falls and is injured. No ladder or other safe means of descending is provided by the employers. To discharge the employers there must be a finding of fact that the workman undertakes the risk of dispensing with performance of the employer's duty towards him. (c)

PROPOSITION XII

When
knowledge
presumed.

Knowledge by a workman of dangers incidental to the particular work on which he is employed is to be presumed; but knowledge of dangers incidental to the general system of the employment, and not necessarily attaching to the particular work, must be shown to be undertaken by the workman.

Illustrations.

A labourer is injured by the fall of a sugar mould that he is assisting to hoist. The accident happens through the substitution of a cheaper and less efficient method of raising the sugar moulds for a more costly and safer one. The presumption is that the labourer knew of the danger. (d)

(d) *Thomas v. Quartermaine*, 13 12 B. 11, 655. But now in all the finding of fact must be left to the jury. *Atk. 21*. See *Wallace v. Carter Paper Mills Co., Ltd.*, 19 R. 915.

(e) *Horn v. Eddison and Belfast Junction Ry. Co.*, 51r R. C. L. 206. In *Thomas v. Quartermaine*, 13 12 B. 11, 655 at 666, Bowen, L.J., says, "More knowledge may not be a conclusive defence. There may be a perception of the existence of the danger without comprehension of the risk." "There may, again, be concurrent facts which justify the inquiry whether the risk though known was really in control voluntarily."

(f) *Wilkinson v. Birmingham Battery and Metal Co.*, 1891] 2 12 B. 338. This case seems absolutely inconsistent with *Dymon v. Leach*, *infra*. The decisions seem to have veered round to the principle of the canon law: *Presumptum ignorantia, ubi scientia non probatur*, Sext. V. De Regulis Juris, 48.

(g) *Dymon v. Leach*, 26 L. J. Ex. 221. The tendency of modern cases is certainly in a contrary direction to this case. When cited it is most generally distinguished, e.g. *Fowler v. Lock*, L. R. 7 C. P. 272 at 278; and

A labourer is injured while working at undermining a wall. He is presumed to have known the danger. *a)*

A stone is left in the roof of a mine in a dangerous position. It falls on a miner who is digging out coal. He must be shown to have undertaken the danger. *b)*

A workman is engaged in working a crane. Near him others are working blasting rock. He is injured by an explosion. There is no presumption that the workman undertakes the risk. *c)*

PROPOSITION XIII

No obligation on an employer to alter or improve machinery is presumed where the workman knowingly enters on the employment with the machinery in any particular condition. An obligation is presumed where during the employment machinery becomes deteriorated.

Imperfect and
deteriorated
machinery.

A workman undertakes an employment which in its nature is dangerous. He does so at his own risk against the risk. *d)*

A workman enters on an employment not in its nature dangerous, but is supplied with defective tools, and the machinery is in bad condition to his knowledge. He cannot recover for injury sustained in consequence

since *Smith v. Baker*, [1891] A.C. 513, the employer is never withdrawn from the principle. See the note to *Williams v. Gough* [111 & N. 258 at 259]. The extent to which the judicial legislation in *Smith v. Baker* for the dicta of the Lords come to nothing short of this. But it modelled the law may be seen by reference to *Molloy v. Greenwich Island Land Reclamation Company*, [1901] 1 T.L.R. 291, and *Williams v. Birmingham Battery and Metal Co.*, [1899] 2 Q.B. 413. Cf. *Lloyd v. Woodland Brothers*, *Times* newspaper, 7th Nov., 1902.

(a) *Ogden v. Rimmens*, 3 T.L.R. 751.

(b) *Paterson v. Wallace* (1854), 1 Macq. (H.L.) 518.

(c) *Sword v. Cannon*, 1 Duntop 491. See *Smith v. Baker*, [1891] A.C. 513. Proof of knowledge of risk, it must be borne in mind, is not enough to disentitle the workman to recover. There must be also the finding of an agreement to undertake the risk. *Williams v. Birmingham Battery and Metal Co.*, [1899] 2 Q.B. 413. *Inf.*, 4.

(d) *Booker v. Hughes*, 3 T.L.R. 418, per Lord Coleridge, C.J. "If it were negligence to direct a man to do work more or less dangerous, it would be impossible to do such work."

Chap. II. thereof, unless the condition of the tools and machinery has deteriorated since he undertook the employment. (a)

A wall, part of the premises on which a workman is engaged, becomes ruinous and dangerous *after* the workman was engaged in the service, and while he is actually employed at the work. The employer is bound to take precautions. (b)

PROPOSITION XIV

Defective management of good machinery.

An employer is not responsible to his workmen for injury resulting from the defective management of reasonably efficient machinery by other servants in whose selection due care has been exercised.

Illustrations.

A miner is upset while being drawn up from the pit in a cage which is unskillfully handled by the workman in charge of the winding apparatus. The employer is not liable. (c)

The duty of a yardman is to examine all plant before it goes out from the yard, so that no defective plant is used. A workman is injured by the breaking of a round of a ladder passed by the yardman. The employer is not liable. (d)

Employers provide a tram to carry their workmen to and from their works, and charge nothing for the accommodation, nor do they constrain their workmen to use the tram, which passes under a bridge. A workman—a mason, is engaged under the engine of the works to strengthen the bridge, and to that end erects a scaffolding close to the line. A workman at one of the two cranes which are being worked in conjunction is returning home seated on the floor of the carriage, with his feet projecting beyond the carriage step. As the tram passes under the bridge his

(a) *Clynen v. Leach*, 26 L. J. 15, 221, per Bramwell, B. (*Chalko v. Holmes*, 7 H. & N. 337, per Colclough, C.J., at 413 and approved by Kelly, C.B., *Mordy v. Phillips*, 35 L. J. (N.S.) 477 at 478. See further per Lord Cranworth, *Bartonhill Coal Co. v. Reid*, 3 Macq. (H. L. Sc.) 266 at 290. But see note (a).

(b) *Per Pigot*, C.B., *Vaughan v. York and Vooghal Ry. Co.*, 12 Ir. C. L. R. 297. See too *Chalko v. Holmes*, 7 H. & N. 337, and *ante*, 22, also *Armour v. Hahn* (1895), 111 U.S. 313.

(c) *Bartonhill Coal Co. v. Reid*, 3 Macq. (H. L. Sc.) 266.

(d) *Ormond v. Holland* (1858), E. B. & E. 102. See *ante* 23, as to incompetent servants.

foot catches the scaffolding, he is thrown on the line and killed. In an action under Lord Campbell's Act, the jury finds that this accident is caused by the negligence of the mason and the engineer. The risk is a risk of the employment, and no difference is made by the workman having left his work and being on his way home, if he is still on the premises where he works (a).

Chap. II.

A chorus girl is engaged to perform in a pantomime. As she is leaving the stage where scene shifters are shifting the scenery she is injured by the fall of a piece. The employer is not liable since the chorus girl may be injured as incident to the employment the risk of negligence on the part of one engaged in the same employment (b).

Men are engaged by a firm of ballast contractors to ballast a ship. In the ordinary way this work is done by hand winches. The men ask to be allowed to use the ship's donkey engine and obtain permission on condition that they get a competent man to work the engine and pay him. The engine is accordingly handed over to them, and while being used explodes and injures a man. The ship owners are not liable. The lender is gratuitous, and liability does not arise unless there is concealment of any particular circumstance, e.g. long non-use, or negligence in not disclosing defect. There is no duty of examination (c).

PROPOSITION XV

Where a statutory obligation is imposed for the protection of workmen, the workmen may contract themselves out of the same, provided that --

Statutory safety
guards.

- (1) The statutory obligation is imposed for the benefit of a class only, and not for the benefit of the community at large; and

(a) *Goldrick v. Partridge, Jones & Co., Ltd.*, 21 T. T. R. 640.

(b) *Burr v. Theatre Royal, Drury Lane*, 1907 1 K. B. 544.

(c) *Coughlin v. Gillison*, 1899 1 Q. B. 145.

- Chap. II. (2) In making the contract there is consideration given, and neither force, fraud, duress nor undue influence used.

Quidlibet potest renunciare juri pro se introducto. (a)

Illustrations.

At the time of the passing of the Employers Liability Act, 1880, min is contributory to a benefit fund in conjunction with their employer. One of the benefits is an allowance made to the widow and family of any workman-contributor killed in the course of his employment. On the day on which the Act comes into operation the employer publishes a document which is brought to the notice of the workmen, and which requires adhesion to its terms as a condition of employment. By it the employer engages to continue his contribution to the benefit fund in consideration of the workmen abandoning the benefits of the Act. A miner who continues at work on the terms of the employer's circular is killed while thus engaged. In the absence of force, fraud or duress, and therefore consideration, his widow is bound by his renunciation. *b*

A youth under age enters the service of a railway company. He agrees to become a member of an insurance society to which the employer contributes and to accept the advantages of the society in lieu of any claims under the Employers Liability Act 1880. He is injured while still under age, and brings an action by his next friend against his employers, claiming for disaffirm his contract. The contract was for his benefit and binding on him. *c*

A boy between thirteen and fourteen years of age, employed at a colliery, makes an agreement with a railway company by which, in consideration of being allowed to travel to and from his work on the railway on special terms made between the colliery proprietors and the railway company, he agrees to renounce any claim against the company for compensation for injury or loss occasioned by the negligence of the company or their servants. He is injured through the negligence of the company's servants. The agreement is not binding on him, as it was to his detriment. *d*

(a) *Rowbotham v. Wilson*, 8 R. & B. 123, see per Martin, B., at 151. Lord Westbury, C., quotes the maxim in the form — *Unique compert renunciare juri pro se introducto* in *Engham v. Wylie*, 10 H. L. C. at 16, *Post*, 294.

(b) *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357.

(c) *Clements v. L. & N. W. Ry. Co.*, [1874] 2 Q. B. 483.

(d) *Flower v. L. & N. W. Ry. Co.*, [1894] 2 Q. B. 65. The element of statutory obligation is wanting in this case. The illustration is, however,

PROPOSITION XVI

Ch. 1 -

Where the risk of the employment is apparent at the time of entering on the employment, the presumption of law is that the workman enters on the employment on the terms of encountering the risk, even though in fact he has no knowledge of its existence.

Volenti non fit injuria (a)

A workman is engaged on machinery which is a defect open and palpable. Whether, at the time of entering on the employment, he knew of its existence or not he is presumed to have accepted the employment subject to the risk, though a jury may find the fact to be otherwise. (b)

A workman falls into an unneeded vat, open to view in a room in which he has been at work for many months. He is presumed to have accepted the risk of the employment though a jury may find the fact to be otherwise. (c)

A workman undertakes work on unsafe premises. The onus is on the workman to show his employer's knowledge and his own ignorance of the unsafe conditions of the work. (d)

Proposition XVI and the illustrations to it must be taken subject to the very material modifications affirmed in *Williams v. Birmingham*

given us indicating the constituents to be taken into account under clause 2 of the proposition, see Chitty, *Contracts* (13th ed.) 20, n. (1), 198-201, 562, 581-587. Where an Act of Parliament in effect makes a contract for a man, he is not *per se* prohibited from waiving his rights to the benefits secured to him, but where a penalty is imposed by Act of Parliament for doing or omitting something, a person subject to the Act cannot contract himself out of it. *Inverforth and Looghal Ry. Co. v. L. R.* 1 Ch. 748, *Griffiths v. Earl of Dudley*, 9 Q. B. D. 457.

(a) Wing Max. 182. This maxim is found in Homer, *Iliad*, l. 13 *ἐκὼν ἀκούειν γὰρ θεῶν* and can be traced to Y. B., 31 Edw. I. (ed. Horwood) at 9, and, in the form *Scienti et consentienti non fit injuria neque dolus*, to the Canon law. Sect. V, De Regulis Juris 28. While Manwood, J., appeals to it as an axiom, in *Grendon v. Bishop of Lincoln* (1575) Plow. 493. See again Horne v. Widdlake, Yelv. 141, and an article in the Journal of the Society of Comparative Legislation, New Series, No. XLIII (December, 1907), 185, Labatt, Master and Servant, 908, Salmond, Torts, 46. In Sir Walter Scott's *The Betrothed*, Father Alroyand is made to say "I hold with the learned scholast, *Volenti non fit injuria*," c. 20, about two-thirds through.

(b) *Yarmouth v. France*, per Lord Esher, M.R., 19 Q. B. D. 647 at 653.

(c) *Thomas v. Quartermaine*, 18 Q. B. D. 685.

(d) *Griffiths v. London and St. Katharine Docks Co.*, 18 Q. B. D. 269.

Chap. II. Battery and Metal Company, and that the question is always for the jury (a)

The law as thus modified was invoked as the reason for granting the new trial in *Isaacson and Another v. New Grand Clapham Junction, Ltd.*, &c.

PROPOSITION XVII

Risk super-added.

Where a risk is added after the commencement of the employment, the presumption is that the workman does not undertake the risk till it appears that he has actual knowledge and a full appreciation thereof, and notwithstanding, has continued in his employment; and not even then if his continuance in the employment is explained by other circumstances.

Illustration.

A workman is engaged on machinery. A defect subsequently becomes apparent thereon. The workman reports it. The employer promises a remedy, and induces the man to continue to work. There is no presumption that the workman accepts the risk. (b)

A workman, who never in fact engaged to meet a particular danger finding himself exposed to it, complains. To avoid dismissal he continues at the work and is injured. It is for a jury to say whether his continuance at work operates as an undertaking of the risk. (c)

A workman is engaged in circumstances where the acceptance or non-acceptance of certain risks is left to implication. He cannot be held to have undertaken them unless he knew of their existence, and appreciated or had the means of appreciating the danger, and not necessarily even then, since the conclusion to be drawn may vary with the circumstances of each case. (e)

PROPOSITION XVIII

Statutory duty superperformed

Where a statutory duty is imposed on the employer, and is unperformed and an accident happens to a workman,

(a) [1899] 2 Q. B. 338. See Proposition IX., ante 29.

(b) 19 T. L. R. 150.

(c) *Clarke v. Holmes*, 7 H. & N. 937, per Cockburn, C. J., at 945.

(d) *Yarmouth v. France*, 19 Q. B. D. 647, per Lindley, L. J., at 661.

(e) *Smith v. Baker*, [1891] A. C. 325, per Lord Watson, at 355.

the presumption is that the employer is in default; and this is not displaced by proof that the workman had equal knowledge or means of knowledge, with the employer. Chap. II.

By Statute (a) there is an implied duty to fence every fly-wheel directly connected with the steam-engine, or water-wheel, or other mechanical power, in a factory. An engine-driver's duty requires him to grease the bearings of a fly-wheel. To do this he has to stand on a wall, in a cavity made for the purpose, into which he crawls through the spokes of the fly-wheel. At this place the fly-wheel is unfenced. On the sixth morning of his employment the engine driver is caught by the fly-wheel and killed. The employers are in fault in not having fenced the fly-wheel. They are *prima facie* responsible (b). Illustration.

PROPOSITION XIX

There is a greater duty to take care on an employer in the case of a "young person" than in the case of an adult. Special duty to young persons.

A girl of sixteen is injured by the bursting of a soda water bottle which she is filling. The machine she uses is fitted with a guard, but when it became necessary to take the bottle from the machine the guard drops. Then a mask is provided which she does not use. She can recover from the employer, as a young person (c). Illustrations.

A girl is employed at a machine cutting hemp. Her regular duty involves no danger, but the foreman, seeing that some of the hemp shops,

(a) 7 & 8 Vict. c. 17, s. 21. See now 1 Edw. VII. c. 22, s. 10.

(b) *Butlin v. Great Western Cotton Co.*, 1 L. R. 7 Ex. 130. See, per Bowen, L.J., *Thomas v. Quartermaine*, 18 Q. B. D. 624 at 666, *Kelly v. Globe Sugar Refining Co.*, 20 R. & B. 187, 181.

(c) *Crockett v. Banks*, 4 T. L. R. 321. The Scotch Court do not seem so liberal in their interpretation of the phrase "young person" as the English Court of Appeal. *Forbes v. Aberdeen Harbour Commissioners*, 15 R. 343, *Morris v. Boase Spinning Co. Ltd.*, 22 R. 316, *Gibson v. Nimmo*, 22 R. 421. By sec. 156 of the Factories and Workshop Act, 1901 (1 Edw. VII. c. 22), "young person" is defined: "a person who has ceased to be a child and is under the age of eighteen years." A child is "a person who is under the age of fourteen years and has not, being of the age of thirteen years, obtained the certificate of proficiency or attendance at school mentioned in Part III. of this Act." These definitions are substantially the same as those in the Factory Act, 1833 (3 & 4 Will. IV. c. 103). By the Shop Hours Act, 1862 (25 & 26 Vict. c. 62), s. 9, a young person means a person under the age of eighteen years.

Chap. II. tells her to replace it between the rollers in a way he indicates. Two or three days afterwards while doing so her fingers are caught in the rollers. The employers are liable for the default of their foreman (a)

An inexperienced girl is employed in a hazardous manufactory under the control of an overseer. She is injured. The employer is bound to protect her in her work (b)

A boy of twelve is employed at a railway level-shaft on a platform surrounded by railway lines. He is told his duties by a boy of the same age as himself. The boys are in the habit of crossing the rails instead of going by the footpaths when going about their work. Their practice is known to the man in charge, who does not forbid it. There is a notice at the station warning the public not to cross the rails, but to go by the footpaths. The boy knows the danger, but crosses the rails and is injured. Knowledge by the boy of the danger does not exonerate the employer from responsibility to keep him out of danger as alleged by specific instructions.

PROPOSITION XX

Young person
meddling.

Where a young person is injured through meddling *outside* his work, the employer is not liable unless knowledge of the meddling can be brought home to one with authority to intervene and who does not do so.

(a) *Guzzle v. Frost*, 3 F. & F. 622

(b) *O'Byrne v. Burn*, 16 Dindop 1025, as explained by Lord Chelmsford in *Bartonsill Coal Co. v. McGuire*, 3 Macq. (H. L. Sc.) at 311. In the United States it has been held in the Supreme Court in *Union Pacific R.R. Co. v. Fort*, 17 Wall. (U. S.) 553, that a father making a contract of work on behalf of a child is presumed not to consent to the child being exposed to hazardous work. "It is not possible to conceive that the contract would have been made at all if the father had supposed that his son would have been ordered to do so hazardous a thing." If Lord Chelmsford's view of *O'Byrne v. Burn* is correct, and the principle of the United States case is accepted, *Barker v. Midland R.R. Co.*, 47 L. T. 476, should have been decided otherwise at common law. The parent does not, however, seem to have been suggested, *cp. Nash v. General Steamship Co.*, 7 T. L. R. 597, and *Crocker v. Banks*, 4 T. L. R. 324. Judge Wheeler in *Greenwood v. Greenwood*, 24 T. L. R. 24, seems to have held a *facto* labourer aged twenty to be a "young and inexperienced person," but *quoniam*.

(c) *Robinson v. W. H. Smith*, 17 T. L. R. 423. *Post. 92 et seqq.*

A boy engaged in a lucifer factory meddles with other work. A workman of full age standing by does not interfere. The boy injures himself. The employer is not liable. (a)

Chap. II

Illustration

PROPOSITION XXI

An employer who uses due diligence in choosing workmen is not answerable for an injury received by one through the default of another while both are engaged in the common employment. (b)

Common employment.

A scaffolding is erected under the superintendence of a builder's foreman. The workmen use an unsound ledger, to which the attention of the foreman, who is not incompetent, is called. A bricklayer is at work on the scaffold when the ledger breaks, and he is thrown to the ground and killed. The employer is not liable for an injury caused by the default of a fellow workman. (c)

Illustrations.

A girl of fifteen years of age is employed in a cartridge factory under a forewoman, whose duty is to give her proper instructions and warnings in the dangerous nature of her work. The forewoman is competent for her work but is negligent in the performance of it, and the girl is injured thereby. The employer is not liable, for the duty of instruction may be delegated, and the negligence of a forewoman is a risk which a fellow-servant, even though an infant, undertakes. (d)

A boy of fifteen is injured through his arm being caught in a circular saw used at engineering works where he is employed. The employers are found negligent in not sufficiently instructing the boy how to use the machinery. The employer's duty extends no further than to employ a

(a) *Murphy v. Smith* (1865), 19 C. B. (N. S.) 361; cp. *Lynch v. Nurdin*, 1 Q. B. 29, *Mangan v. Atterton*, L. R. 1 Ex. 239, *Bailey v. Neal*, 5 T. L. R. 20, and *Harrold v. Watney*, [1898] 2 Q. B. 320.

(b) Chapter I, "Common Employment," *ante*, 13.

(c) *Wignore v. Jay*, 5 Ex. 354. See *Wilson v. Merry*, L. R. 1 Sc. App. 326, per Lord Chalmers, at 338. This case would now be within the Employers Liability Act, 1880, s. 1, sub-ss. 1 and 2.

(d) *Cribb v. Kynoch, Ltd.* [1907] 2 K. B. 548.

Chap. II. competent foreman to give proper instruction, regard being had to the boy's age and other circumstances. Where the competent foreman is negligent in giving instruction there is no liability on the employer. (a)

PROPOSITION XXII

Co-operation in work.

Where workmen of different employers are co-operating in the same place and at the same time, and the workman of one is injured by the default of the workman of another employer, such injured workman can recover from the employer of the man causing the injury.

Quotations.

Bidders contract to erect a block of building, under a specification prepared by the architect of the building owner. Fire-proof floors are to be put down by specialists in that kind of work. The fire-proof specialists are not under the direction or control of the builders. One of the builders' servants is injured by one of the fire-proof specialists' workmen's negligence. The builders' workman can recover from the fire-proof specialists. (b)

A porter in the employment of one railway company is injured by the negligence of the engine-driver of another railway company. Both companies use the station where the accident happens in common; and their servants, while in the station, are subject to the rules of the first-mentioned company and to the control of their station-master. The porter can recover from the engine-driver's employer. (c)

A signalman is one of a joint station staff. One railway company engages him, pays him and can alone dismiss him. He is bound to perform certain duties for the other. The signalman is killed by the negligence of a driver of the other company. His representatives can recover from that company. (d)

(a) *Young v. Hofmann Manufacturing Co., Ltd.*, [1907] 2 K B 646; *Bur v. Theatrical Royal, Dury Lane*, [1907] 1 K B 544. See the sections in Mr. Labatt's *Master and Servant* on the "duty of instruction considered with reference to the servant's minority," pp. 553 *et seq.* to 578.

(b) *Johnson v. Lindsay*, [1891] A. C. 371. *Carter v. Nystrom*, [1893] A. C. 308. *ante*, 13.

(c) *Warburton v. G. W. Ry. Co.*, L. R. 2 Ex. 30.

(d) *Swanson v. N. E. Ry. Co.*, 8 Ex. D. 841.

PROPOSITION XXIII

Where different employers co-operating in a common work stand in the relationship of contractor and sub-contractor, the workman of a sub-contractor is not disentitled to recover against the contractor for injury received, in the course of the common work, from a workman of the contractor, unless he either expressly or impliedly consented to accept the contractor as his master for the purposes of the common employment; neither *mutatis mutandis* is a workman of the contractor disentitled when injured by a workman of the sub-contractor.

Contractors agree with other persons for the execution of portions of the work. These persons engage a workman, who is paid by the contractors who have a control over and power to dismiss him. He is injured by a workman engaged by the contractors. He is not entitled to bring an action against them for Contractor and sub-contractor, 1

Cotton brokers employ a cartman to fetch cotton from their warehouse. The cartman is receiving bales into his cart, when through the negligence of the warehouse porter a bale falls on him. The cartman can recover from the cotton brokers. *(b)*

A shipowner employs a stevedore to unload his vessel. The stevedore employs his own laborers. Amongst these he engages one of the crew, whom he pays, and over whom he exercises complete control while engaged in unloading. A laborer of the stevedore is injured through the default of the member of the crew. He cannot recover from the shipowner. *(c)*

A railway company employ a contractor to unload coal trucks. The contractor engages his own men, and exercises all control over them. One of the men is injured by the improper shunting of an engine bringing

(a) *Wiggett v. Fox* (1856), 11 Ex. 832, as explained by *Chamell v. B.*, who had been counsel for *Fox*, in *Abraham v. Reynolds*, 5 H. & N. 143 at 149-150. See *Johnson v. Lindsay*, 1891, A.C. 371, per Lord Herschell, C., at 379.

(b) *Abraham v. Reynolds* (1860), 5 H. & N. 143.

(c) *Murray v. Currie* (1870), L.R. 6 C.P. 24, distinguished in *Oldfield v. Furness, Withy & Co.*, 9 T.L.R. 515. See also *Cunningham v. Grand Trunk Ry. Co.*, 31 Upp. Can. Q.B. 350.

Chap. II. coal trucks to a siding. The injured man can recover from the railway company. *(a)*

Colliery proprietors make a contract for sinking a shaft. They provide a steam engine in charge of an engineer to facilitate the work. The engineer is under the sole orders and control of the contractor, and is paid by the colliery owners. By the engineer's negligence one of the contractor's men is injured. He is not entitled to recover from the colliery proprietors. *(b)*

Employers lend a workman to another firm to work a mine. He negligently causes injury to a workman of the other firm. The injured workman cannot recover from the original employer. *(c)*

A steamship company contract with a stevedore to discharge a cargo. The company are to provide a watch-driver. They provide one of the crew. He negligently causes injury to one of the stevedore's labourers. The labourer is entitled to sue the steamship company. *(d)*

PROPOSITION XXIV

Workman no re-
course against
contractor's
employer.

Where an employer contracts for the execution of a particular work to be carried out under ascertained circumstances of risk, a workman of the contractor's cannot recover against the employer for injuries, sustained in the course of the employment, caused by a contemplated risk

The owner of a Drongham horse and harness keeps them at a livery stable, the keeper of which was used to lend one of his servants to drive the Drongham. On one occasion while driving, the driver through negligence loses control of the horse, which dashes through a shop

(a) *Turner v. G. E. Ry. Co.* (1875), 33 L. T. (N. S.) 431.

(b) *Bourke v. White Moss Colliery Co.* (1876), 1 C. P. D. 556, 2 C. P. D. 205.

(c) *Donovan v. Laing, Wharton and Down Construction Syndicate*, [1893] 1 Q. B. 623.

(d) *Claridge v. Union Steamship Co.*, [1904] A. C. 185. The well-known Scotch case of *Woodhead v. Gartness Mine & Co.*, 4 R. 462, is overruled by *Johnson v. Lindsay*, [1891] A. C. 371. *McCallum v. North British Ry. Co.*, 20 R. 386. *Carr v. Clyde Navigation Trustees*, 35 Sc. L. R. 808.

window, doing damage. There is evidence that the driver is the servant of the livery stable keeper in respect of this casualty. (a) Chap. II.

A carman makes a contract with iron foundries to supply a van, horse and driver for the purpose of delivering goods to their customers. In performance of the contract a van and horse in charge of a man in the carman's employ are sent to the iron foundries' premises to take some goods to the premises of one of their customers. The goods are secured by a chain. Some of the customer's men are sent on the arrival of the car at the destination to assist delivery. Before they are ready to set to work the driver negligently unfastens the chain, and one of the customer's men is injured. The control of the driver when delivering the iron foundries' goods remains in the carman. (b)

A railway company undertakes the repair of a tunnel. The repairs are to be executed without interfering with the working of the ordinary service of trains. A workman is injured by a passing train. He has no right of action against the railway company. (c)

PROPOSITION XXX

Where a person is permitted voluntarily to undertake work in conjunction with the workmen of some other person, in which work he has no interest arising out of a Volunteers without a duty.

(a) *Jones v. Sculland*, 1898 2 Q. B. 365.

(b) *Widdell v. Widdell*, 1911 2 K. B. 765. The contract may sometimes be not to perform any sort of work, through the agency of a servant, but merely to procure a duly qualified servant to do the work, in this case the contract is not liable for the negligence of the person supplied. *Hall v. Lees*, 1901 2 K. B. 602, *Evans v. Mayor, &c., of Liverpool*, 1900 1 K. B. 160.

(c) *Woodley v. Metropolitan District R. Co.* (1877), 2 L. R. 381. The workman would have a right if the contractor's employer was in default as to his general duty to him - for example, in not disclosing some latent danger. *Indermann v. Daines*, L. R. 2 Q. B. 311. Cp. *McInulty v. Primrose*, 24 R. 112. If the workman uses the head employer's material which is on the ground to save himself the trouble of bringing the contractor's material, and the material used proves defective, the employer is not liable, for he has not undertaken to provide any. A window cleaning company sent a window cleaner to clean the roof lights of a factory under a contract. The window cleaner did not take the necessary appliances with him as he should have done, but found a plank on the roof which he used. The plank was rotten, and he was injured. The window cleaner could not recover in respect of his injuries. *Russell v. McLeish and McTaggart*, 65 Sc. L. R. 818.

Chap. II. duty, by undertaking the work he places himself in the position of a fellow-servant of those workmen whom he engages in assisting.

Illustrations.

A man assists servants of a railway company to turn a truck on a turntable. An engine comes into the siding where the work was going on. The man is struck and injured through the want of care of the engine driver. He is in no better position than a fellow-servant. *a*

A man is waiting at a warehouse to load cotton. Workmen of the warehouseman are lowering bales into a cart. The man waiting intervenes to assist the servant in the cart. A bale falls on and injures him. He is in no better position than a fellow-servant. *b*

PROPOSITION XXVI

Volunteers with a duty.

Where a person is permitted voluntarily to undertake work in conjunction with the workmen of some other person, in which work he has an interest arising out of a duty, and undertakes the work with a view to the advancement of his interest (but in this case only), the employer of the workmen with whom such person has undertaken the work is responsible for any injury that results from want of care and prudence of his servants in the course of the work, or from the defective condition of the premises on which the work is carried on.

Illustrations.

The practice at a railway company's station is to unload coal wagons by shunting them and tipping the coal into cobs. There is also a practice for the consignees to assist in this. A consignee of a coal wagon which cannot be unloaded because all the cobs are occupied, by permission of

(a) *Dogg v. Midland Ry. Co* (1857), 11 F. & N. 773. A passer-by, casually appealed to by a workman for information, does not make himself a volunteer by affording it. *Cleveland v. Spier*, 16 C. 11 (N. S.) 399.

(b) *Potter v. Faulkner* (1861), 1 B. & S. 800. See *Lanoue v. Glasgow & S. W. Ry. Co.*, 8 F. 516, *Little v. Summerlee Iron and Coal Co.*, 17 Dandop 810, and an Irish case, *O'Sullivan v. O'Connor*, 22 L. R. 1r. 467.

the station-master goes to his waggon along a flagged path (which is the accustomed way), takes some coal from his waggon, and descends on to the flagged path. The flag he steps on is worn and gives way. The consignee falls and is injured. The consignee is engaged in a matter of common interest to both parties with the consent of the railway company. He has a right of action against them. (c)

A consignor sends a heifer by rail. On the arrival at the destination the railway company had not sufficient porters to shunt the box in which the heifer is conveyed to a siding, where only can delivery be given. The consignor assists in the shunting, and is injured by the negligence of the railway company's servants. He is entitled to recover. (d)

(a) *Holmes v. North Eastern Ry. Co.*, (1933) 1 L. R. 4 Ex 254, 1 L. R. 6 Ex 123.

(b) *Wright v. T. and N.W. Ry. Co.* (1875), 1 L. R. 10 Q. B. 298; 1 Q. B. D. 252. *Cp. Wylie v. Caledonian Ry. Co.*, 9 Macph. 463, which is a very similar case, though decided on a different principle, and *Little v. Nelson*, 17 Dunlop 310, a decision previous to that in *Buttenshull Coal Co. v. Reid*, 3 Macq. (H. L. sc.) 260. A distinction must be drawn between acts done to assist and acts prompted by some other motive, yet which, when done, do assist. Thus if a runaway horse is stopped by a person jeopardized by its career, such person does not by stopping the horse constitute himself the servant of the owner. *Sherman & Redfield, Negligence* (5th ed.), § 183. Mr. Labatt collects and summarizes a vast body of authority under the heading 'Right of Action where the injured person was not in the service of the defendant for any purpose, Master and Servant,' pp. 1872-72.

CHAPTER III

NEGLECT

PROPOSITION I

NEGLECT is absence of care according to the circumstances.^(a)

A man takes another in his carriage without previously examining its bolts and lashings. A blacksmith examines these every three months. During the journey an accident happens which might have been averted if the owner had examined his carriage before starting. He is not negligent as regards his companion in not doing so.^(b)

A railway company make a cursory examination of a truck travelling over their line. A minute examination might discover a crack in an axle through which an accident subsequently happens. They are under no duty to make the more minute examination.^(c)

A person hires a carriage, a pair of horses, and a driver from a job-master. While being driven a bolt in the under-part of the carriage breaks, and an accident results. The carriage is eight or nine years old. About fifteen months before the accident it had been repaired by a competent person. The defect in the bolt, if any, could not be discovered by any ordinary inspection. The duty of the job-master to his customer

(a) See per Willes, J., *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679 at 688. "The ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract. Negligence is simply neglect of some care which we are bound by law to exercise towards somebody": per Bowen, L.J., in *Thomas v. Quartermaine*, 18 Q. B. D. 685 at 691. *Ante*, 16. The phrase "wilful negligence" has been frequently observed upon, yet it has been used by great judges, e.g., *James, L.J.*, *Hatchife v. Bannard*, 1. R. 6 Ch. 632 at 651, and Lord Setborne, *O. Dixon v. Muckleston*, 8. R. 8 Ch. 155 at 160. Where used it signifies that the law does not regard wilful acts as such, but in their aspect as breaches of legal duty—the ignoring a duty which is negligence in its legal valuation, even though intentional.

(b) *Moffatt v. Bateman*, L. R. 8 P. C. 115.

(c) *Richardson v. Great Eastern Ry. Co.*, 1 C. P. D. 342.

D. E. L.

Negligence

Chap. III. is to see that the carriage is as fit for the purpose for which it is hired as care and skill can render it. (a)

A coach breaks down on its journey by reason of an extraordinary accident. The proprietor is not liable, apart from any contract he may have made with his passengers. (b)

A master orders his servant to put a lot of rubbish against his neighbour's wall, but so as not to touch it. It is possible to execute the order. The servant uses ordinary care and skill in doing the work, yet notwithstanding the rubbish touches the wall. The master is liable for his servant's act. (c)

A fierce dog is kept in a garden walked all round. A trespasser is bitten by the dog. The master is not liable. (d)

A man goes on premises to remove his luggage where the owner has a fierce dog. He is bitten. The master is liable. (e)

(a) *Hyman v. Nye*, 6 Q. B. D. 685.

(b) *Scoble*, per Parke, B., *Hawtorn v. Bourne*, 7 M. & W. 595 at 598 and 599. See *Gwilliam v. Twist*, 1895, 2 Q. B. 81 per Lord Esher, M.R., at 87. "*Ad id quod frequenter accidit, res adaptantur*," 4 H. L. C. at 405. 9 H. L. C. at 52. With this compare 1150-17, 84. "*Ex quo uno ad alium, non ferre ad alius modo conpulantur*." *Beard v. London General Omnibus Co.*, 1900, 2 Q. B. 530.

(c) *Gregory v. Piper*, 9 B. & C. 291.

(d) *Satchell v. Blackburn*, 4 C. & F. 267 per Tindal C.J. "Undoubtedly a man has a right to keep a ferocious dog for the protection of his property." In *Baker v. Snel*, [1908] 2 K. B. 352, a barmaid sued her employer for injuries from the bite of a dog kept by him and known both to him and the barmaid to be "a savage one," which was set on her by the barman. Charnell and Sutton, J.J., were of opinion that the employer was liable. The action, however, was at common law, and the barmaid and barman were fellow servants, and a taking of the risks of the acts of one another would be a term of their respective contracts. *Idole*, 13. "I venture the suggestion, though the point cannot here be argued at length, that the liability for keeping of a 'savage dog' is not as Charnell, J., says it is—"in the same position" as the liability attaching to keeping a "wild animal" of the tiger class. True, in declaring on an injury from either the *scienter* is not necessary. In the case of a fierce dog, however, which "undoubtedly a man has a right to keep," the *prima facie* liability may be rebutted by showing absence of negligence. In the other case, where not protection of property or other such motive but whim only is the reason for keeping the animal, the liability may be absolute, as Bramwell, B., suggests in *Nichols v. Mansfield*, L. R. 10 Ex. 255. A possible difficulty about the *causa causans* and the *causa proxima* of the injury is dealt with by Lord Lindley in *Fenton v. Thorley*, 1903 A.C. at the bottom of p. 454. On appeal, *Coxon-Hardy*, M.R., and *Fairwell*, L.J., held that "it was a wrongful act to keep an animal which was known to be dangerous," i.e. a dog that has snapped at any one. 24 T. L. R. 811. Sir E. Coke said that the common law is the perfection of reason. Can this then be the common law 'or is the *dictum* at fault.' Kennedy, J. J., did not agree with the majority. He would allow the dog's owner to show, as in *Weaver v. Ward*, 110b. 194, that the result was utterly without his fault, that the liability was *prima facie*.

(e) *Stiles v. Cardiff Steam Navigation Co.*, 88 L. J. Q. B. 310.

A man keeps a monkey. Without any special default of the owner alleged it bites a woman. The owner is liable, (a)

PROPOSITION II

Legal liability postulates some responsible person to whom it may attach, as distinguished from an agency. ^{Intelligent agent.}

A practical joker throws a lighted squib into a crowd. A bystander, to protect himself, *instinctively* and without premeditation throws the squib away in the direction of another person. He acts in a similar manner, and others likewise. Ultimately the squib bursts, puts out a person's eye. That person has a remedy against the first person setting the injurious agency in motion, but the action of the intermediate persons if merely inactive does not affect them with any liability (b)

A horse is bound by bridle and overwhelmed by the wind. There is no liability. (c)

Despite all precautions known to prudent and experienced carriers, a storm destroys goods entrusted to a carrier for transport. He is not liable for the loss. (d)

A man rides a horse at a slow pace in Emslau, Ohio, to try it. The horse is restless. The man uses every precaution against accident. The horse swerves, lashes out, and injures a man. The rider is not liable. (e)

A horse, drawing a brougham, suddenly and without any cause that is discovered to account for the conduct, bolts and, despite every reasonable effort of the coachman to control him, swerves on to the foot-way and injures a passer-by. Twenty yards *after* the bolt the horse casts a shoe. The coachman does not call for assistance. There is no evidence of negligence against the owner of the horse. (f)

(a) May v. Burdett, 9 Q. B. 101.

(b) Scott v. Shepherd, 1 Sm. L. C. (11th ed.) 451. The condition of the validity of this view of the decision (which primarily turned on the pleading distinction between trespass and case) is that in none of the stages of the burst of the squib is an original, or diverting power exercised.

(c) Dyer 33, Case (10).

(d) Nugent v. Smith, 1 C. P. D. 123.

(e) Hammack v. White (1863), 11 C. B. (N. S.) 698.

(f) Manzoni v. Douglas, 6 Q. B. D. 145. As to *onus*, see *post*, 72.

Negligence

Chap. III.

PROPOSITION III

Absence of responsibility

Legal liability is not imputable to a person wholly unable to distinguish the character of his acts. *(a)*

Illustration.

One child throws a stone at another child which puts out her eye. No liability arises from the act since there is no responsibility. *(b)*

PROPOSITION IV

Constraint.

Legal liability is not imputable to a person who acts under compulsion, or under the overmastering influence of terror.

Illustrations

"If a man by force take my hand and strike you, so that it appears to have been inevitable by me, I shall not be liable." *(c)*

A coach proprietor neglects to provide a proper escaping rein. The one he does supply breaks. A passenger is thereby placed in a perilous position. In his agitation he leaps off the coach and breaks his leg. His act is instinctive and not voluntary. The coach proprietor's default is the legal cause of the accident. *(d)*

PROPOSITION V

Uninterrupted sequence of consequences.

In determining on whom responsibility for injuries caused by negligence should fall, the last intelligent

(a) Wharton, *Negligence* (2nd ed.), § 88. Query: Could a maniac's estate be rendered liable for the death of one killed by the maniac, under Lord Campbell's Act, 9 & 10 Vict. c. 93, s. 1, the words of which are "Whenever the death of a person shall be caused by a wrongful act, neglect or default"? Again, where negligence or default is necessary to constitute a cause of action, can one who, by hypothesis, cannot discriminate his actions be accountable for them? This is discussed, Deven, *Negligence* (5th ed.), 47, 558-570.

(b) Harvey v. Dunlop, 13 Ill. & Demo. Supp. Vol. by Lalor, 193, per Nelson, C.J., at 194.

(c) Weaver v. Ward, 110b 134.

(d) Jones v. Boyce, 1 Starkie (N.P.) 461, approved Lindley L.J., in "The City of London," 15 P.D. 15 at 18. See too Adams v. Lanes & Y.Ry. Co., L.R. 4 C.P. at 713. *Post*, 91.

agent (*a*) must be ascertained; and if, between the agent setting the mischief at work and the actual mischief done, there intervenes an intelligent agent (*b*), not within the exception of Proposition IV., who should have averted (*c*) the mischief, the original wrongdoer ceases to be liable. Where there is no fault there is no responsibility.

Chap. III.

Sugar is delivered to a railway company to carry. They put it in proximity to some weed-killer they are also carrying. They do not know anything as to the properties of the weed-killer. When the sugar is delivered it is wet. This is a not unusual incident to the carriage of sugar, and not necessarily injurious to it. The grocer to whom the sugar is delivered sells some to a person, who eats it and is killed. The weed-killer is an unusual preparation the exclamation from which poisons the sugar. Neither the grocer nor the carrier are liable. *Illustrations.*

A dock-owner supplies and puts up staging is incident to the use of his dock. A painter contracts with a shipowner using the dock to paint his ship in dock. The painter employs workmen one of whom is injured through the breaking of a rope supporting the staging. He can recover from the dock-owner.

(a) is a person legally responsible for his act. *Per L. 63*

(b) The contents of an "intervening cause" are considered in the Canadian case of *McKelvin v. The City of London*, 22 Ont. R. 70, per Falconbridge, J., at 77. *Up. Bickelbe Arabin and Soda Fabrik v. Bickel Chemical Works, Bindschadler*, [1898] A. C. 200, per Lord Halsbury, C., at 201, and per Lord Herschell at 201.

(c) The test is not who *ought* have averted it, but who had a duty to avert the mischief. *Up. Loader v. London and India Dock Joint Committee*, 8 T. L. R. 5.

(d) *Cramb v. Calabomon Ry. Co.*, 19 R. 1051.

(e) *Heaven v. Pender*, 11 Q. B. 133, distinguished in *Calabomon Railway v. Mitchell*, 1898 A. C. 216. *Up. Alowday v. Merryweather*, [1895] 1 Q. B. 857, 1895 2 Q. B. 610, *P. Woods v. Hutchison*, 16 R. 691, *Cameron v. Waller*, 35 S. L. R. 337. If A supplies an article to B for the use of C, A is liable to C on the general duty. *B may be liable also to C on his contract*, but if A supplies something to B on which B has to do work before it is used by C, A is not liable to B in respect of any particular as to which B has to do work or to exercise his judgment. *Up. Marney v. Scott*, 1890 1 Q. B. 986. I have been informed that on the shipowner paying the costs and damages, an appeal in this case was abandoned. *Bigham's* rule (at p. 993), that *some slight attention* ought to be devoted to the condition of the tackle and appliances which the stevedore's labourers are to use in their "work" is not very illuminating, especially as he negatives any duty "to have the vessel surveyed from

Negligence

Chap. III.

A physician writes a prescription for his patient. The charge for making up the prescription is included in the fee which is paid by the patient to the physician. In making up the prescription the druggist's clerk compounds a wrong and harmful ingredient. The patient is injured. The druggist is liable for the injury, and not the physician. *a*

A man, his wife being ill, purchases what is believed to be the prescribed medicine from a druggist. The druggist had procured the jar from which the medicine is taken from a dealer, who had procured it from the manufacturer. The jar is labelled with the name of the manufacturer, and the description of the preparation intended to be put therein. The jar in fact contains deleterious matter which injures the wife. There is no duty on the druggist or the dealer to examine and test the medicine so supplied and labelled, therefore the manufacturer is liable. *b*

stem to stem." Can any duty be formulated, and what? Bazham, J., seems to reach his conclusion by assuming that the charterer's duty to the stevedores men is the same as the stevedores' duty to them. But the charterer's relation to the stevedore is contractual only. The shipowner's liability to the workman comes under the principle enunciated by Cotton and Bowen, L.J., in *Heaven v. Pender*, 11 Q. B. D. 501 at p. 515, there was "an obligation to take reasonable care that at the time the appliances provided for immediate use were provided they were in a fit state to be used; that is, in such a state as not to expose those who might use them to any danger or risk not necessarily incident to the service in which they were employed." In *Scott v. Esley, Atkinson & Co.*, 5 Com. Cas. 53, the defendant in *Mann v. Sault* recovered against the shipowners on their warranty. Generally, it may be said that the liability of the possessor of a chattel to persons permitted or invited to use it does not differ from that of the occupier of dangerous premises to persons entering on them. *Smith v. Steele*, 1. R. 10 Q. B. 125. *Hartley v. Mayor, &c., of Rochester*, 1908] 2 K. B. 391, does not seem to be a case under the proposition enunciated at all. It was a case of the violation of a statutory duty, which cannot be delegated. *Proposition X, post*, 61.

(a) *Stutton v. Holmes*, 19 Q. B. D. 256. If the druggist is known to be an incompetent person by the physician, the physician would be liable.

Engelbart v.
Farrant & Co.

(b) *Thomas v. Winchester*, 8 N. Y. 397, *Bagelow, Leading Cases on Torts*, 620, where the principle under discussion is examined. In *Fugelhart v. Farrant & Co.*, and *T. J. Lupton*, 1897, 1 Q. B. 210 at 216, 247, *Bigby, L.J.*, said that the proposition is not law that "wherever between the negligence of a servant and the accident the act of some third person intervenes, and is the proximate cause of the accident, the employer is not liable." As stated, without limitation the proposition is clearly not law. If the servant of a manufacturer of patent lozenges were to pick up some actively poisonous compound, and the Government stamp were affixed to the packet, and the lozenges passed through the hands of half-a-dozen retail dealers, the civil liability of the master would assuredly be no whit less than had he made the preparation with his own hands and distributed it. Nevertheless, there would be the intervention of a third person, whose sale of the poisonous compound to the purchaser would be the proximate cause of the injury. But if after the poisonous compound had left the manufacturer's it comes into the hands of some one whose duty is to test it, and who does not do so, the employer is as plainly not liable as in the

A person insures himself under a policy in which it is agreed to pay **Chap. III.**
him a certain sum if he should be injured by accidental violence and

former case he is liable. If he is, he is liable for what he has not done; for he is entitled to assume that those who act subsequently to him or their servants will do their legal duty, and not be in a fault. The case was not appealed for use of an indemnity from an insurer.

In cases like *Hedge v. Goodwin*, 5 C. & P. 190, and *Engelhart v. Fareant & Co.* *supra* (cf. *Whatman v. Pearson*, 11 R. & C. P. 122), to leave a cart unattended is, in the circumstances, a wrongful act. The intervention of the third party is a reasonable and probable consequence flowing from the wrongful act, and not a diversion of responsibility for it. In *Engelhart v. Fareant*, if Taylor was Lipton's servant, then his act bound Lipton. If he was not, then Morris was negligent in leaving the cart unattended, and Taylor's intervention was, in the opinion of the Court of Appeal, a natural and probable consequence of his negligence, for which Lipton was responsible. This explains one way of looking at *Birrows v. Marsh* (1893) and *Cole v. Turner* (1894), 7 Ex. 96, and *Petersen v. Mayor of Blackburn* (1895), 1 R. & C. P. 157, 7 Ex. 96, and *Petersen v. Mayor of Blackburn* (1895), 1 R. & C. P. 157. A man has a right to be negligent as he likes, with the proviso only that his negligence does not harm any one else. He has also a right to act on the assumption of the ordinary course of things flowing on in the order. If his negligence in concert with the natural sequence of events produces injury to another, he is not the less liable because the proximate and operative cause of the mischief is a foolish and thoughtless man, than if it were a savage and unrestrained animal. If his negligence only brings injury through the intervention of an act not natural and probable, he is not responsible. *Shirley v. Powell*, 11 R. & C. P. 157. But if a wrongful act is followed by a not probable consequence the wrongdoer is in a fault. Accidents to the head have been known to set up epileptic phenomena, and many years ago I remember when that accident had in fact occurred, it was sought to excuse the person who inflicted the blow on the head from the consequences of his crime because his victim had died of pneumonia, and not as it was contended by the blow on the head. *per Lord Halsbury, C.*, *Burnton v. Laidlaw*, 1902, A.C. at 231. Neither is a person liable for negligence the consequences of which it is the duty of some intervening person to divert, before they can work injuriously. *Cp. Dunham v. Clare*, 1902, 2 K.B. 292, *per Collins, M.R.*, at p. 296.

Two of the judges in *Engelhart v. Fareant* unfavourably criticised *Mann v. Ward*, 8 T.L.R. 691. The facts of that case are reported as follows: A man crossing a road was knocked down by a cab driven at a furious pace. The cabdriver was made drunk. The man driving at the time of the accident was under the influence of drink. The injured man sued the cab-proprietor. He was nonsuited, and the Court of Appeal sustained the nonsuit. To render the cab-proprietor liable, negligence must be shown on his part. To make negligence there must be a duty to the party injured and a breach of the duty. The duty to the injured man in the present case was assuredly not a duty to see that the cab, in no circumstances, and in no one's hands to whom it might come, should not do him an injury. There was a duty on the cab-proprietor, neither by himself nor by his servant in charge of the cab, to do any act causing injury to any member of the public. If the drunken man had been driving the cab at the time of the accident, clearly the master would have been liable. But neither master nor man did anything. The cab was practically unattended, and though probably in that condition affecting its master with liabilities under the Cab Acts, and in circumstances like those in *Hedge v. Goodwin*, still not like a savage beast broke loose. Admitting that the act of the master in committing his cab to the charge of a drunken

- Chap. III.** — should die within three months of the occurrence if the injury should be the "direct and sole cause" of his death. The policy is subject to the condition that it should not apply to "death . . . caused by or arising wholly or in part from" any "intervening cause." The insured accidentally inflicted a wound on his leg with his thumb nail. The leg becomes inflamed, erysipelas sets in, septicaemia follows, and death ensues through septic pneumonia. The erysipelas, septicaemia and septic pneumonia are not "intervening cause." (d)

PROPOSITION VI

Negligence
pre-supposes
duty

There can be no negligence in law unless there is shown to exist some legal duty (b) owing by a responsible person, (c) who is the cause of the act complained of, to the person complaining of the act

Illustrations.

A bill for £500 is presented for acceptance. The stamp on the paper is of much larger amount than is necessary. On the bill as drawn at the time of presentation spaces are left in which figures for a larger amount than the £500 for which the bill is drawn might be inserted. The acceptor, without taking any precaution against the amount inserted in the bill being increased, writes his acceptance on the bill as presented to him. The drawer fraudulently fills in the spaces and turns the bill into a bill for £3,500. This bill he negotiates and obtains money for. There is

calaman would have rendered the master liable if injury had resulted, in the case in question none in fact did. The cab was absolutely harmless. The drunken man who seized upon the cab set at work a new train of consequences, clearly out of the ordinary and natural course, and which could not be anticipated. Thus the cab-proprietor had violated no duty to the injured man. The violation of duty to him was by an act not a natural and probable consequence of anything the cab-proprietor did. If the cases are inconsistent, Mann v. Ward, both as to the decision of a much stronger Court and also as more in record with the other cases, seems the preferable decision to Engelhart v. Earrant. Besides which in Engelhart v. Earrant, according to Rigby, L.J., in that case (at p. 217) "We sitting here and dealing with the finding of the County Court judge as to matters of fact, ought to exercise the function of a jury," so that no binding rule of law was laid down. Cp. Gwilliam v. Twist, [1885] 2 Q. B. 84.

(a) *Mardorf v. Accident Insurance Co.*, [1903] 1 K. B. 584.

(b) *Id.*, 15.

(c) See Proposition V, *ante*, 52.

on duty on the acceptor towards any person who may take the bill for value to use any degree of care in signing or issuing it (a) **Chap. III.**

A man takes his stand in the midst of excavating operations to watch the men working. He has no concern with the working, and no business there. Through the breaking of a chain while he is leaning on he is injured. There is no duty on the excavators to modify their method of working through his presence. He takes the risks incident to the position in which he voluntarily places himself. (b)

A private path by a rural is allowed to get into a bad condition. People walking along it are not interfered with by the owners of the path. Through the bad condition of the path a passer along it is injured. There is no negligence in law, because the owners are under no legal duty to persons merely permitted to use the path. (c)

PROPOSITION VII

A duty to take care arises where the person or property of one stands in such a relation to some other person or to property that, unless care is exercised, according to the natural and probable course of events, damage may result.

A man is driving along a road in a town. He has a duty to take care to drive so as not to injure any one who may probably be using the road. *Illustration*

A man is driving on Salisbury Plain for any described place where in

(a) *Schofield v. Earl of Lonsdowne*, [1895] A.C. 511. An even stronger case is *Patent Safety Lamp Cotton Co. v. Wilson*, 19 L.J. Q.B. 718 (Beven, *Negligence* (3rd ed.), 1317).

(b) *Batchelor v. Fortson*, 11 Q.B. 471. Care must be taken not to extend this decision beyond its proper limits. Had the defendant known that the man was in a dangerous position he should have warned him. The principle of the case may be stated to be that "no duty was cast upon the defendant to take care that the deceased should not go to a dangerous place." If he were there to the knowledge of the defendant's servants, there would be a duty not recklessly to injure him, but not a duty to alter their mode of working, unless they had reasonable cause to regard it as dangerous. (c) *Le Lievre v. Gould*, [1893] 1 Q.B. 491 at 497, also per *Bramwell, B.*, *Degge v. Midland Ry. Co.*, 1 H. & N. 773 at 777.

(c) *Gautret v. Egerton*, L.R. 2 C.P. 371, cp. *Barrett v. Midland Ry. Co.*, 1 F. & F. 861.

Chap. III. ordinary course he would meet or could impute no one]. He may drive as fast and as recklessly as he pleases, *a*

A man draws a certificate carelessly. In the absence of contract he is not responsible in law for what he writes, *b*

A laborer in the employment of stevedores brings an action under the Employers' Liability Act, 1880, on account of personal injuries sustained by him through the fall of a stanchion which is unlashed and unsupported on the ship on which he is going to work. There is no duty on stevedores to inspect the ship to see to its safety for their servants, *c*

The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 458), gives statutory protection to seamen by providing that as between a shipowner and the master, seamen, and apprentices on board his ship, an obligation is implied that the owner, the master, and every agent charged with the loading or preparing for or sending the ship to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the voyage.

PROPOSITION VIII

Unusual or
dangerous forces

The duty to use care increases in proportion to the danger involved in dealing with any agency requiring more than the normal amount of care and skill in the handling.

(a) *Le Lacroix v. Gould*, [1893] 1 Q. B. 491, per Lord Fisher, M.R., at 497. If the man driving on Salisbury Plain sees a party ahead of him he is as much bound to care to avoid hitting them as if they were in the highway, but he is not bound so strictly to anticipate that a party will be there, and till the circumstances are such as should raise the anticipation, no duty to take care arises. *Lloyd v. Dugby*, 5 C. B. N. S. 167. *Wharton*, Negligence (2nd ed.), § 882. See *Moore v. Ransome's Dock Committee*, 14 T. L. R. 599. As reported there is no indication of what the functions of the defendants were or their duty to the deceased.

(b) *Le Lacroix v. Gould*, [1893] 1 Q. B. 491, per Bowen, L. J., at 502.

(c) *McLachlan v. ss. "Plover" Co.*, Ltd., 23 R. 753. This decision does not affect the question of the liability of shipowners or other persons responsible for the condition of the ship. Cp. *Heaven v. Pinder*, 11 Q. B. D. 503. See further, *Carter v. Clarke*, 14 T. L. R. 172. *Inf.*, 26 (a), 58 n. (c), and *passim*, 184.

(d) *Boven*, Negligence (3rd ed.), 1025-1034; *Stroud*, Judicial Dictionary (2nd ed.), *sub loco*.

"The law of England in its care for human life requires consummate caution in the person who deals with dangerous weapons." *a)* **Chap. III.**

Illustrations.

"I am by no means sure that if a man kept a tiger, and lightning broke his chain and he got loose and did mischief, that the man who kept him would not be halde." *b)*

A gas fitter is employed to repair a gas meter. He removes it from the premises, and in his haste makes a temporary connection between the inlet pipe and the house pipe. The householder's servant in the ordinary course of his duty goes to the cellar room where the meter had been removed carrying a light. There is an explosion, due to an escape through the influence of the temporary connection. The servant is injured. The gas fitter is halde. Having to deal with a highly dangerous thing, he is bound to use the greatest care. *c)*

Exhibitors let off fireworks at the Crystal Palace. A person entering the Palace grounds is struck on the leg by a firework and injured. The mere occurrence of the accident justifies leaving the case to the jury. *d)*

A boy finds his father's gun in a field and, taking it up, not knowing that it is loaded, points it at the plaintiff, who is injured by the discharge. The plaintiff is entitled to recover damages against the boy's father.

PROPOSITION IX

Legal duty is fixed by reference to the rule of care Notion of duty progressive. for the time being ordinarily obtaining in the occupation, class, and circumstances about which the inquiry is concerned, and is dependent on the state of knowledge and practice of the class of those whose conduct is being tested,

(a) Per Hale, C.J., *Potter v Faulkner*, 1 B & S 801 at 805. *Dixon v. Bell*, 5 M. & S. 194. See also *Goldstone v Giffard*, Times newspaper, 19th January, 1899.

(b) Per Bramwell, B., *Nichols v Mansland*, 2 L. R. 10 Ex. 255 at 260.

(c) *Parry v. Smith*, 4 C. P. D. 325.

(d) *Whitby v Brock*, 4 T. L. R. 241.

(e) *Sullivan v. Creed*, [1904] 2 L. R. 317, distinguished in *Cook v. Midland Great Western Ry. of Ireland*, [1908] 2 L. R. 242.

Chap. III. and progresses with the growth of science and the increase of experience. (a)

Illustrations.

A passenger on a railway platform on Christmas Day is injured by being driven by a crowd against a portable weighing machine, the foot of which projects six inches on therabouts above the level of the platform; the machine is unfenced, and had stood in the same position for some years. The accident could not reasonably have been foreseen. There is no liability. (b)

A particular kind of lattice cloth is kept without accident for a long time in proximity to an engine which emits sparks. An accident at length happens through the cloth catching fire. It has long been known to be inflammable. There is a duty to guard against the probability of fire. (c)

A point-man who has but an instant to decide what to do with a run-away engine on the main line (the driver having been seized with a fit, without negligence turns it into a siding on which there is a train at rest, rather than allow it to meet an advancing express train. A person in the train at rest is injured, and sues the railway company for negligence. First, for not having two men in charge of the engine; and secondly, for having the points of the sidings so arranged that the engine must necessarily, in case of the driver being incapacitated, pass on to the main line. The operation of coupling an engine (in which the driver was engaged at the time of his seizure) is one usually conducted by one man with safety. It is therefore not negligence to make preparations for its performance in the accustomed way. As to the second point, it is not negligence not to foresee that a plan safely adopted for many years may result in accident. (d)

Premises are flooded with water which is ultimately discovered to have escaped from a fracture in a water main. The pipes are cast iron,

(a) See *Hanson v. Lanes and Y. Ry. Co.*, 20 W. R. 297, *Wise v. Aberdeen Harbour Commissioners*, 14 R. 416, and *Withams, J.*, summing up in *Frimantle v. L. & N.W. Ry. Co.*, 3 F. & F. 337 to 340. A man is negligent not merely in falling short of doing his duty in what he knows but in what he ought to know. The test of this fact is the knowledge reasonably to be anticipated from his contemporaries of his class.

(b) *Common v. Eastern Counties Ry. Co.*, 4 H. & N. 581, see *Blockman v. B. and S. C. Ry. Co.*, 17 W. R. 509, also in (b), *ante*, 54.

(c) *Thomas v. Great Western Colliery Co.*, 10 T. L. R. 244. The fact of previous accidents at the same place and in similar circumstances may be given in evidence as tending to show that there had been negligence in providing means of prevention. Cp. *Brown v. Eastern and Midlands Ry. Co.*, 22 Q. B. D. 891.

(d) *Hart v. Lanes & Y. Ry. Co.*, 21 L. T. (N. S.) 261. *Ante*, 19.

which is the material used by all other water companies. The sole suggestion of negligence is that cast iron is an improper material for water pipes. Use of the material in general use discharges the water company's duty. They are not bound to invent something more efficient. *a)*

Chap. III.

PROPOSITION X

Where a duty is imposed by statute, such duty is absolute, and a breach of it is actionable, even although the person, bound to the performance of it by the statute, is wholly without fault

Breach of statutory duty actionable.

A district council having a statutory duty to construct a sewer, employ a contractor for the work. In carrying out the contract a gas main is broken, its escape into a house and causes an explosion, injuring the occupants and the furniture. The district council is liable, for a statutory duty cannot be delegated. *b)*

Illustrations.

A district council on behalf of the owner to make up a road under sec. 151 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), make a contract to do the work. The contractor leaves on the roads a heap of soil unlighted and unprotected. A person walking along the road after dark falls over this heap and is injured. The work contracted to be done is likely to cause danger to the public unless precautions are taken. There is an obligation on the district council who order the work to see that the precautions are taken which render its execution safe, on the double ground that the work is statutory and that it is dangerous. *c)*

The danger to be provided against where there is no statutory duty seems to be a "danger to the public." The rule of law here considered

(a) *Snook v. Grand Junction Waterworks Co.*, 2 T. L. R. 308, per Huddleston, B. "They (the Water Company) are only bound to use what (description of pipes) are in general use." This is not absolutely accurate. If water companies were either designedly or by a coincidence to use water pipes in fact inefficient for the ordinary purposes of water pipes, they would not by their unanimity discharge their duty. On the other hand, invariable use by all companies raises a very strong presumption that the pipe so used is reasonably fit for use, still the presumption may be rebutted.

(b) *Hardaker v. Idle District Council*, [1896] 1 Q. B. 835.

(c) *Penny v. Wimbledon Urban Council*, [1899] 2 Q. B. 72, *Holliday v. National Telephone Co.* [1899] 2 Q. B. 893.

Chap. III. has been generalized: the occupier of property cannot escape liability by employing another to work on his property—

- (1) Where this work to be done is illegal.
- (2) Where the very object of it is to do something injurious to the rights of a third person.
- (3) Where there is a statutory duty.
- (4) Where the work is dangerous.

PROPOSITION XI

Negligence in the performance of a statutory duty to provide safeguards is evidence of negligence, in the same matter and apart from the statute, at common law

Illustration. Railway legislation (*a*) provides for precautions in running certain trains. An accident happens to a train, within the meaning of the legislation, where the precautions had not been taken, if they had been the accident might possibly have been prevented. This is evidence of a breach of common law duty. (*b*)

PROPOSITION XII

Standard of duty at common law. The rule of duty which one man must observe in his intercourse with others requires the exercise of that amount of care and knowledge which an ordinary intelligent person ordinarily exerts in similar circumstances. If he undertakes duties requiring a special skill he is bound to the exercise of that amount of care and skill in his undertaking as an expert in the same sort of business ordinarily exerts in similar circumstances. Whether a legal duty can exist in

(a) The Regulation of Railways Act, 1908 (31 & 32 Vict. c. 119), s. 22.

(b) *Blamires v. Lancs. & Y. Ry. Co.*, L. R. 8 Ex. 283, per Brett, J., at 288; *Proves v. Lord Wimborne*, [1898] 2 Q. B. 402, *Hardaker v. Idle District Council*, [1896] 1 Q. B. 395. *Jute*, 25.

the circumstances is matter of law for the direction of the judge; whether in the particular case it does is for the jury. (a) Chap. III.

A medical man calls on a former patient in a friendly manner. He has reason to believe that a member of the family is insane. He communicates with the authorities, and the person so alleged to be insane is confined in consequence. The person is not insane, and brings an action. The standard of duty required is that of an ordinary intelligent person only, as the visit was not a professional one. *Illustrations.*

A surgeon is employed to cure the leg of a patient. The leg had been broken and set and the callus of the fracture formed. He disunites the callus, and fixes on the leg a heavy steel instrument with teeth to stretch or lengthen the leg. The treatment is injurious and professionally wrong. The surgeon is liable for his breach of duty. (c)

A solicitor is ignorant of the rules of practice of the Court, and neglects to attend with the witnesses when his case comes on for trial. He is guilty of breach of duty. (d)

PROPOSITION XIII

Where injury is caused to a third person by reason of the negligent act of an intelligent agent co-operating with Co-operating negligence.

(a) This direction he gives by ruling whether there is evidence of negligence to submit to the jury, do the facts proved raise a legal duty. *Per Lord Cairns, Metropolitan Ry. v. Jackson, 1 Q. B. Cas. at 197. Holmes, The Common Law, 120.* The case of *Dodd v. Wilson, 21 T. L. R. 238*, is difficult to deal with seriously. A doubt arises which, by the way, is not noticed by the Divisional Court, whether the relation was that of master and servant at all, but not rather of bailor and bailee. *Wimble v. Smith, 2 Q. B. 270, 282.*

(b) *Thompson v. Schmidt, 8 T. L. R. 120.* *Cp. Morris v. Atkins and Brooker, 18 T. L. R. 628.* "A man who had a disorder in his eyes called on a *garçon* for a remedy, and he applied to them a medicine commonly used for his patients; the man lost his sight and brought an action for damages, but the judge said: 'No action lies, for if the complainant had not himself been an ass he would never have employed a *garçon*.'", *Sir Wm. Jones, Bailments, 100.* See *per Heath, J., in Shells v. Blackburne, 1 H. Ll. 153 at 161.*

(c) *Slater v. Baker, 2 Wils. (C. P.) 359.*

(d) *Godfrey v. Balton, 6 Bing. 460, per Tindal, C. J., at 468. Spondeo perituum aris. Spondeo diligentiū gerendo negotio parum Imperitia culpe adqumatur.* *Story, Bailm. § 431.*

Chap III. the act of some other intelligent agent (*a*), the test of liability is whether the negligent act is an "effective cause" (*b*) of the injury

Illustrations "It seems strange to say that A shall not be responsible for his negligence because B has been negligent likewise (C being the party injured)"

A is guilty of manslaughter if B's negligence co-operating does not detract from the result of A's venoms (*d*)

A gas company put a defective pipe in the shop of one of their customers. The servant of a plumber negligently takes a light to inspect the pipe. There is an explosion. The gas company is liable, (*e*)

PROPOSITION XIV

**Joint wrongdoer
liable for the
whole injury**

Where injury arises through the concurring acts or omissions (where there is a duty to act) (1) of different persons or forces, each wrongdoer is liable jointly and severally for the whole injury, unless the acts or omissions

(a) See Proposition V, *ante*, 25

(b) See per Lord Esher, M.R. *Emmellart v. Farrant*, 1897, 1 Q.B. 210 at 243. This phrase seems to be one coined by Lord Esher to express a portion of the proximate or efficient cause, using the language of the Schoolmen. Lopes J., uses it a fortnight later in *Lord Gifford v. Kent County Council*, 1897, 1 Q.B. 901.

(c) Per Gresswell, J., *Thorogood v. Bryan*, 8 C.B. 111 at 121. The rule as to the case which is to be used in regard to property adjoining a spot on which the public have rights of traffic is stated by Lord Blackburn, *River Wear Commissioners v. Adamson*, 2 App. Cas., 713 at 767.

(d) *Reg v. Haines*, 2 C. & K. 368

(e) *Burrows v. March Gas and Coke Co.*, 1, R. 5 L. 67, 7 L. 5 96. In the Ex. Ch. this case was decided on the ground of contract. See, however, per Kelly, C.B., L. R. 5 Ex. at 70.

(f) In *Hartley v. Mayor, &c., of Rochdale*, 1908, 2 K.B. 594, the conclusive answer to the bold contention of the defendants is that the road authority were under no duty to act, i.e. no enforceable legal duty, and the defendants were guilty of breach of duty, the consequences of which were in full operation. On the contract the water authority might recover against the road authority. *Hyams v. Webster*, L. R. 4 Q.B. 118 is the same case with the important difference that the defendant was not guilty of negligence.

can be discriminated, and the consequences of each **Chap. III.** attributed to its author.

A dock company are subject to a duty to construct a river wall of a **Illustrations.** certain minimum height. They build it in one portion below the level allowed. An exceptionally high tide overflows their wall and causes damage. The dock company is *prima facie* liable for the whole damage caused *causa*.

Two steamships come into collision through the fault or default of the masters and crews of both. A passenger injured on one ship can recover against the owners of either or both the ships. *b*

PROPOSITION XV

If an intelligent agent, in conjunction with irresponsible agents, produces an effect not in ordinary course produced without the operation of an intelligent agent, the intelligent agent is liable for the whole effect produced; and the intelligent agent continues liable for the natural (c) consequences of his act until the injurious operation of the effect is exhausted or is diverted by some other intelligent agent. *(d)*

Intelligent agent acting in conjunction with irresponsible forces

A passenger on a highway receives injury occasioned partly by one **Illustrations.**

(a) Nitro-Phosphate and Odium's Chemical Manure Co. v. London and St. Katharine Docks Co., 9 Cb. D. 501. See *Child v. Harrow*, L. R. 9 Ex. 176 at 180. The rule as to contribution between joint tortfeasors is treated, *Merryweather v. Nixon*, L. R. 1 C. (D.M.C.) 343. "No wrongdoer can be allowed to apportion or qualify his own wrong." The application of which is limited by *Palmer v. Wick and Pulteney Steam Shipping Co., Ltd.*, [1894] A.C. 118. "It might admit of a different construction if he could show, not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done." per *Tindal*, C.J., *Davis v. Garrett*, 6 Bing. 716 at 721. *Harrison v. Great Northern Ry. Co.*, 3 H. & C. 231.

(b) *Mills v. Armstrong*, 13 App. Cas. 1. As to the disability of the defendant to make a third person party to the action, see *Horwell v. London General Omnibus Co., Ltd.*, 2 Ex. D. 365.

(c) Or "probable." See *Grove v. J. L. R. 7 C. P.* at 259.

(d) See Proposition V., note 52.

B.E.L.

Chap. III. which covers the road and partly by defect in the structure of the road. The road authorities are liable for the whole. (a)

A person places a heap of refuse on his land against his own wall, which adjoins his neighbour's house. Rain falls on the heap, and makes its way into the neighbour's house. The person placing the heap, who it caused mischief is liable for all the consequences. (b)

A horse, while being led along a public road, slips on some ice and breaks its leg. The ice results from water used in washing a van in the public street in breach of a Police Act. The waste water runs into a gutter towards a grating over the sewer. The grating is obstructed by ice, and the water flows upon a portion of the causeway. If the causeway had been in a proper state of repair the water would have flowed away without doing damage to any one. The person responsible for washing the van does not know of and has no duty to enquire about, the defective condition of the causeway. He is not responsible for the stoppage or accumulation of water, but in ordinary circumstances would flow down the grating to the sewer and not freeze on the causeway. (c)

PROPOSITION XVI

Act of God Legal liability does not attach for any occurrence due to natural causes directly and exclusively, and which no amount of fore-sight and care reasonably to have been looked for in the circumstances can avert. (d)

Illustrations A shipowner, subject to the liability of a common carrier, receives a mate to be carried on his ship. Through badness of weather and her fight and struggling, the mate receives such injuries that she dies. The shipowner is under no liability for her loss. (e)

(a) Wharton, Negligence (2nd ed.), § 86.

(b) *Hindman v. North-Eastern Ry. Co.*, 3 C. P. D. 168.

(c) 2 & 3 Vict. c. 47, s. 54.

(d) *Sharp v. Powell*, L. R. 7 C. P. 251. If the person for whose act the proprietor of the van was responsible were shown to have had knowledge of the stoppage of the grating, of course the result would have been different. See *Hindaker v. Idle District Council*, [1896] 1 Q. B. 335, per Smith, L.J., at 350, *note post*, 69.

(e) See per James, L.J., *Nugent v. Smith*, 1 C. P. D. 423 at 444.

(f) *Nugent v. Smith*, 1 C. P. D. 423. See *ante*, 16.

PROPOSITION XVII

Legal liability for negligence is limited to the consequences immediately (a), and in ordinary sequence (b), arising from the wrongful act which founds the liability. In determining whether an act is wrongful, only the reasonable and probable (c) consequences of the act are to be looked to. (d) When these indicate probable injury the act is a wrongful one, and liability attaches for all the actual consequences flowing in uninterrupted sequence from the act. (e) When these indicate probable harmlessness the act is a lawful one, and carries no legal liability even though, in fact, harm follows from it.

In jure non remota causa sed proxima spectatur. 1 f)

A ploughman treading in a highway, the dust blown from it frightens Illustrations, the horse of B and nearly carries him into contact with a passing wagon,

(a) "Immediately" in the connection designates consequences which "a reasonable man might foresee", per *Channell, B., Smith v. L. & S.-W. Ry. Co., 1 L. R. 601 P.*, at 21, that is, in the run of cases would have occurred.

(b) "In ordinary sequence" means, "given a negligent act, then all circumstances which in fact result from it and all the natural consequences", per *Kelly, C. B., Smith v. L. & S.-W. Ry. Co., 1 L. R. 601 P.*, at 20.

(c) See note (c) to Proposition XV, ante, 65.

(d) "The law provides for that which is common, not for that which is unusual" per *Parke, B., Haydn v. E. R. Co., 7 M. & W. 300*, at 315.

(e) "When it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not" per *Channell, B., in L. & S. Ry. Co. v. Smith, 1 L. R. 601 P.*, at 21. "I altogether agree that what the defendants might reasonably anticipate is as my Brother Channell has said, only material with reference to the question whether the defendants were negligent or not, and cannot affect their liability if they were guilty of negligence" per *Blackburn, J., L. v. Hughes*, with *Brother Nares*, that whenever a man does an unlawful act he is answerable for all the consequences" per *Coat, J., Scott v. Shepherd, 1 Sm. L. C. (11th ed.) at 459*, to the same effect, "Every one who does an unlawful act is considered as the doer of all that follows" see *De Grey, C. J.*, at 460. *Sir B. Pollock, Torts (8th ed.)*, 41, suggests a different rule, based on the dicta of *Pollock, C. B.*, in *Greenland v. Chapman, 5 Ex.* at 248. "If an act is negligent damages may be recovered for all its direct consequences. To determine whether an act is negligent, foresight of its consequences must be regarded."

(f) *Bacon, Max. Reg. 1.*

Chap. III. in avoiding which the driver, without the necessity of turning his horse so violently as he does, drives over other rubbish placed in the road by C and is overthrown and hurt. B cannot recover against A. (c)

A carriage is driven against the wheels of a chaise. The collision throws a person in the chaise upon the "dashing-board", the "dashing-board" falls upon the horse, the horse kicks and injures the chaise. The person responsible for the collision is responsible for the whole train of occurrences. (b)

The New River Company causes a stream of water to spout on a highway to a height of several feet. The water is unguarded by the company's servants. By the side of the highway is an open ditch insufficiently protected. A horse with a carriage is being driven along the highway. The horse takes fright at the spouting water and falls into the ditch. The Water Company is liable for all the consequences of their negligence. (c)

An Act of Parliament empowers commissioners to lease a canal, the lessees are to do repairs after notice. If the lessees make default in doing the repairs, the commissioners are authorized to do them. One of the locks of the canal gets out of repair. The commissioners give no notice. A barge is blocked by the falling in of the side of the lock. No action lies against the commissioners. (d)

A passenger is wrongfully ejected from a railway carriage. He leaves behind his face glass, which he loses. This loss is the consequence of his own carelessness. The company is not liable. (c)

An Act of Parliament empowers commissioners to construct a cut, with proper gates and sluices, to keep out the waters of a tidal river, and also a culvert under the cut to drain lands on the east side of the cut. The culvert is to be kept open at all times. Through defective construction the river flows into the cut, bursts the western bank, and floods the adjoining lands. The occupier of lands on the east side closes the culvert,

(a) Flower v. Mann, 2 Tinnel 314. If the running stream the second heap was the result of not being able to manage the horse through the fright, then B would be able to recover. (b) 52

(b) Gillerson v. Richardson, 5 C. & F. 562. (c) possibly perhaps dash-board, i.e. the board or leather upon in front of a vehicle

(c) Hill v. New River Co. (1868), 9 B. & S. 308

(d) Walker v. Go., 111 & N. 395, in Ex. Ch. 111 & N. 350

(e) Glover v. L. & S. W. Ry. Co., L. R. 9 Q. B. 25. The result would be different if the glasses were shaken from the person of the passenger by violently removing him, or if such a state of terror and confusion had been produced by the defendants' wrongful act as to induce the loss, *cf.* Woolley v. Scovell, 3 Man. & Ry. 105. The decision went on the leaving of the glasses being the plaintiff's own negligence.

and stops a deal of damage. Occupiers on the west remove the obstruction, and cause the waters to flow again upon the eastern lands. The commissioners are liable for the whole damage. (a)

Chap. II.

A railway company having trimmed the bank and hedges at the side of their line, take the trimmings into heaps between the rails and the hedges, and leave them there for a fortnight in very hot weather. These are set on fire by a spark from one of the company's engines in a high wind. The fire burns the hedges, passes over a middle field and a public road and destroys a cottage 200 yards from the line. The company is liable for all the damage. (b)

A ship, when driven on a pier wall through the negligence of her crew, becomes a wreck, and cannot be removed without breaking her up. To do this involves the sacrifice of valuable property. To avoid the sacrifice the property is unloaded while the ship is still on the wall to which it is doing most damage during the whole time of unloading. The ship-owners are liable for the whole damage. (c)

A person unlawfully washes a car in the public street. Water from the washing flows some distance from the gutter towards a sewer running. This happens to be obstructed with ice. The water flows over a portion of the roadway and then freezes. A horse being led along the road slips

(a) *Collins v. Mobile Trust Commissioners*, 1 R. 401, 279. The ground of this decision is that by the Act of Parliament the culvert was to be kept open at all times. The occupier on the west had that a right to its being open. Cf. *Harmont v. G. N. R. Co.*, 4 H. & C. 231; *Noble v. N. & N. W. R. Co.*, 1 R. 304, 1 L. J. 41; *Whitlock v. Lanc. & N. Ry. Co.*, 13 Q. B. 131.

(b) *Smith v. L. & S. W. Ry. Co.* (1870), 1 R. 50, C. P. 98, in the Ex. Ch. 1 R. 50, P. 11. Lord J. thought otherwise. His rule he preferred was that "the plaintiff is entitled to recover for all the damage caused which was the direct consequence of the wrongful act, and so probably a consequence that if the defendant had considered the matter he must have foreseen that the whole damage would result from that act." In *re London, Tilbury and Southend Ry. Co. and Trustees of Gower's Wall School*, 21 Q. B. 333, at 339, in *Smith v. L. & S. W. Ry. Co.*, in the Ex. Ch., two opinions were contemplated. (a) Whether the act from which the injury flowed was a negligent act. (b) If so, what were the continuous consequences? In determining whether the act was negligent or not, only reasonable and probable consequences *obvious* are to be taken into account. See per Bramwell, B. in *Blyth v. Birmingham Waterworks Co.*, 11 L. J. 781 at 782. When the question of the act is tried, then only the continuousness of the consequences is regarded. (b) b, 57 u. (c)

(c) *Bairns of Romney Marsh v. Trinity House*, 1 R. 5 L. J. 201, in Ex. Ch. L. R. 7 Ex. 247. The position of the ship was due to negligence, the consequences flowed in ordinary sequence from this. If there had been no negligence the loss would have lain where it fell, cf. *The Douglas*, 7 P. D. 151, per Brett, L.J., at 160.

Negligence

Chap. III. on the leg and breaks his leg. The accident is not a reasonable and probable consequence of the act of washing the van. *Id.*

A man is cleaning a window. The sash line breaks. By the jar of the fall the window is broken, the broken glass falls on and injures a passenger. The accident is too unlikely a contingency to be taken by an ordinary careful person, so there is no liability. *Id.*

A railway porter at the arrival platform of a railway station wheels a trunk of luggage to the head of a flight of steps leading to the street. This is an improper place for luggage to be stacked. At the foot of the steps a number of outside porters are waiting an order for a job. A policeman is usually stationed there to restrain them, on this occasion he has left his post. On the coming of the luggage the porters make up the steps, in their struggle for the luggage a package rolls down the steps and injures a passenger. The railway are not liable.

Cattle are rightfully crossing a railway line. Servants of the railway company are at the same time and without proper care moving trucks from a siding. The cattle become frightened, and disappear. Subsequently some are found lying dead on another portion of the railway, whether they have strayed through a gap in a garden fence. The company is liable for all the injuries received by the cattle from the time control of them is lost through the default of the company. *Id.*

A passenger along a public footway is injured by the fall of a plaintiff's tool from the window of an omnibus when adjacent to the footway. A porter walking along a plank causes it to jump, and the tool that was

(d) *Sharp v. Powell*, L. R. 7 C. P. 234. The act of washing the van in the road is not in itself, and apart from its consequences, a breach of duty to the owner of the house, or if it is, the wash is not the proximate cause of the plaintiff's loss or accident. When the water gets into the ordinary channel the consequences of the originally unlawful act are exhausted. The accident caused by water being obstructed from flowing down the gutter. The obstruction is not a matter for which the van-washer is answerable. Cf. *Asquith v. Yates*, 2 H. & N. 718. There the erecting of the boarding was negligent, because it was too wide. The accident occurred through a car backing against it. The negligence in the erecting the boarding was too remote to give a cause of action to the plaintiff who was injured by the fall of it. If the erecting of the boarding had been unlawful, the result must have been different. Cf. the Scotch case of *Morrison v. McAlra*, 2 J. R. 667, also *Abraham v. Bullock*, 85 L. T. 237 at 239—a decision overruled on the main point, 15 T. L. R. 701.

(h) *Robinson v. Reid's Trustees*, 2 F. 928.

(i) *Murphy v. G. N. Ry. Co. of Ireland*, [1897] 2 I. R. 301.

(d) *Snoddy v. Lancs. & Y. Ry. Co.*, L. R. 9 Q. B. 263, 1 Q. B. D. 42.

Causation

lying on the plank is thus dislodged. There is no liability either on the plasterer or his employer. Chap. III.

A person to protect certain interests in property puts up a barrier in circumstances unauthorized and wrongful. This is removed by another person, and put on the side of the way. A third person using the way on a very dark night is injured. The person originally erecting the barrier is liable. (b)

Persons endeavour to force themselves into a railway carriage that is over-full. A passenger tries to prevent their entry. The train moves forward and is on the point of entering a tunnel, when a railway porter, turning away the persons who are attempting to force an entry, shuts the door. As the train begins to move the passenger, to save himself from falling, puts his hand on the handle of the door. His thumb is caught by the door and crushed. The injury is an accident for which the railway company is not liable. (c)

(a) *Pearson v Fox*, 2 C. T. D. 369. The question whether the plasterer's act is a negligent one is dependent on determining whether, in walking along the plank, a reasonable man should have foreseen the consequences—the jumping of the plank, the falling of the tool, the injury of the passer-by. If the evidence had been that the plasterer was jumping on the plank to amuse himself by making it spring, the act would have been negligent and the consequences not to be remedied.

(b) *Clark v Chamberlain*, 112 B. D. 427. See note to Proposition V., discussing *Hedge v Goodman and Farnham*, *Farrant & Co., Ltd.* 45 n. (b) *Powell v McGlavin*, 1902 21 B. 101. In *McIlroy v. G. W. Ry Co.*, [1903, 1 K. B. 648, Kennedy, J., appears to have held that knowledge of a danger arising from the possible neglect of workmen on the part of a guard against it. This as a general proposition is correct, and it is easy to know that people thrown from elevated railways, or the like, do not impose a legal duty on one to force it apart from the ordinary duty under 16 & 17 Vict. c. 13. Kennedy, J., also regarded the act of the railway company in providing a watch-post for their own purpose as imposing a duty to use it for the benefit of third parties. This is incorrect, per Willes, J., *Skelton v. L. & N. W. Ry Co.*, 1 B. 9 C. P. at 166. The Scotch Court arrived at an opposite conclusion in *Murphy v. Smith*, 9 S. 1, B. 109. On principle the decision is correct, in that it limits the owner's liability of property by the disposition of his neighbour, and not by his own conduct. The van as placed was not a cause of danger, per Kennedy, J., at 125. This decision was reversed in the Court of Appeal, 1903 2 K. B. 831, and is discussed in *Beaver, Negligence* (3rd ed.), 97, 432, *Corke v. Midland G. W. Ry. of Great Brit.*, [1908 21 B. 213]. In *Harold v. Watney* the decision turned on the fact of the fence in the condition in which it was, not in which it might become, constituting a danger to those using the highway. *Cp. Horsburgh v. Shoolb.*, 1 P. 268, and *Bargy Ry Co. v. White*, 17 T. L. R. 644 (H. L.). *Post*, 91 n. 161, 97 n. (a).

(c) *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. 198. The grounds of this are—1st. The negligence of the company in having the carriage over-full was not immediately connected with the subsequent injury, 2nd. The slamming of the door in the circumstances was not negligent.

Chap. III. A person while being driven in a cab is upset. Work has been done in the road in laying a sewer, and the surface has been incompletely made up. The driver is induced to swerve aside to another part of the road to avoid the defect, and in so doing comes in contact with a heap of rubbish deposited there by some wrongdoer. The cab is overturned and the passenger injured. The road authority is liable for the injury.

PROPOSITION XVIII

The *onus* of proving *injuria* and damage lies on him seeking to recover in respect thereof, except

- (1) Where there is a presumption of law in favour of an affirmative allegation, the party who supports the negative must call witnesses to rebut the presumption;
- (2) Where the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it.

Et incumbit probatio qui dicit, non qui negat (b)

(a) *Bull v. Mayor, &c., of Shorehitch*, 19 T. L. R. 64 (Q.B.), Collins, M.R., reasons as follows: "A breach of duty as between the defendants and the plaintiffs was clearly established. There was an immediate duty on the part of the defendants towards the plaintiff as one of the class of persons for whose benefit the duty of maintaining the roads had been imposed on the defendants, and whom they must contemplate as being likely to use the roads. There was an obligation on the defendants to safeguard the plaintiff, and under these circumstances in his opinion if there was a chain of causality connecting their breach of duty with the ultimate mischief, then, doubtless, there was *novus actus interveniens*, they were responsible even for the consequences of the act of an independent wrongdoer." See Street, *Foundations of Legal Liability*, vol. 1, 101, *Foresight of Harm*. The other view is set out in Pollock, *Torts* (5th ed.), 41, and Salmon, *Torts*, 103.

(b) 1 D. 22, 3, 2, *cp. Wakeham v. L. & S.W. Ry. Co.*, 12 App. Cas. 11, per Lord Halsbury, C., at 15. See also *Manion v. Douglas*, 6 Q. B. D. 145, and per Lord Wensleydale, in *Morgan v. Sum*, 11 Moo. P. C. C. 307 at 311. See *Angus v. L. T. & Southend Ry. Co.*, 23 T. L. R. 223, discussed from the point of view of *Wakeham* *supra*, *Evans, Negligence* (8th ed.), 144, *Thipson, Evidence* (4th ed.), 24.

A horse bought the previous day at an auction is being ridden in a public thoroughfare to try it. The horse is restless, and the rider takes every care. Notwithstanding, the horse swerves from the roadway on to the pavement, and knocks down a man walking home. The rider is not liable in the absence of proof of knowledge that the horse was vicious and unmanageable. (a)

Chap. III.

Illustrations. *

A passenger in an omnibus sues for injuries caused by a blow from the hoof of one of the horses. No evidence is given that the horse is a kicker, but it is proved that the panel bore marks of other kicks, and that no kicking strap was used. In the circumstances the mere fact of the horse having kicked must be left to the jury. (b)

Plaintiff having given evidence that defendant's horse, harnessed to a cart, ran away unattended along a highway where the plaintiff lawfully was and injured him, the defendant called on to answer the case made, for the facts are more consistent with the absence of ordinary care in the superintending the horse than with such care having been used. (c)

(1) Charterers of a ship are made defendants to a claim for the loss of the ship by fire in consequence of their putting on board a dangerous compound, without giving notice to those employed in navigating the vessel. The plaintiff is required to prove want of notice. (d)

A dwelling-house is leased with a covenant not to permit a sale by auction on the premises without the consent of the lessor. The lessee undertakes the premises, and assigns his goods there under a bill of sale. The assignee sells the goods by auction on the premises. The lessor brings ejectment for a forfeiture by a breach of the covenant. He must prove that the sale is by permission of the lessee, and then the lessor has not given his consent to it. (e)

(a) *Hammack v. White* (1862), 11 C. B. (N. S.) 588, 604, 51 C. 104; 16 Q. B. 404, per *Hill J.*, at 414. "The reasonable view of the law and of the ordinary nature of a horse is that if a man's horse is allowed to go through a street, out on to a footway or a passenger on the side walk, a case of *prima facie* wrong is shown. It may be fully explicable, but I think it calls for explanation."

(b) *Stannard v. London General Omnibus Co.*, 1 R. & C. P. 790.

(c) *Steele v. Dunlop*, 6 F. 12; *Watson v. Wiche*, in *Tollhouse v. Davies*, 57 L. J. Q. B. 222 at 204. So also per *Lindley, J.*, *Manzoni v. Douglas*, 6 Q. B. D. at top of 153, and *Wright v. "defendant,"* *Brougham v. "plaintiff,"* *Brougham*.

(d) *Williams v. The East India Co.*, 3 F. 1102, 6 R. R. 539; *The King v. Haslemould*, 2 M. & S. 558, 15 R. R. 360.

(e) *Toleman v. Portbury*, L. R. 5 12 B. 283.

Chap III. (2) Assignees of a bankrupt sue for a debt due to the bankrupt's estate. The defendant seeks to set off cash notes dated previously to the bankruptcy. He must further show that they came into his hands before the bankruptcy. (a)

PROPOSITION XIX

Fault
presumed.

Where injury is caused by anything under the control of a person and is of a character that in the ordinary course of things does not happen if such person uses proper care, the legal presumption is that the occurrence arises from want of proper care.

But there must be reasonable evidence of negligence; and the mere occurrence of an injury will raise a *prima facie* case;

- (1) Where the injurious agency is under the control of the alleged wrongdoer.
- (2) And the injury is such as in the normal course of things does not happen where those who have the management of things use ordinary care.

Over inanimate things this duty of care is absolute. Over animate beings it extends only to guard against injuries arising from their customary conduct, or any propensity *contra naturam suam* of the animal, of which the owner has knowledge.

Res ipsa loquitur. (b)

(a) *Duckson v. Evans*, 6 T. R. 57, 3 R. R. 119. See Philip on Evidence (5th ed.), 22-33.

(b) *Broom, Lord Mansfield* (6th ed.) 298, *Chapman v. Mason*, 21 T. R. 431 (the bath hen case). The maxim *res ipsa loquitur* does not apply in master and servant cases. The common law rule requires *culpa* as a pre-requisite of liability. Fault must be proved affirmatively, *Paton v. Wallace*, 1 Macq. (H. L. Sc.) 718. In the Supreme Court of the United States, *Patterson v. Texas, & N. Ry. Co.* (1901), 179 U. S. 658, 663, the principle is thus put: "The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence." In *Sterner v. Ontario Spinning Co.* (1898), 181 Pa. St. 519 at 523, a broad principle is formulated: "Excepting where contractual relations exist

A barrel of kerosene falls from a warehouse over a shop which the defendant occupies, and injures the plaintiff, who is walking along the public highway. The fall of the barrel from the defendant's premises is *prima facie* evidence of negligence. (a)

Chap. III

Illustrations.

An officer of customs engaged at certain dock is ordered from one part of them to another. As he goes he is killed by the ground being lowered by servants of the dock company by means of a crane. The fall of the bags is evidence of negligence against the dock company. (b)

A parking case belonging to defendant is runed against the wall of his premises. One of his servants is watching it. This parking case falls on the plaintiff. The fall of the parking case is *prima facie* evidence of negligence, being not up improperly.

between the parties, and the fact of error of person or not, and one other, negligence will not be presumed from the mere happening of the accident and a consequent injury, but the plaintiff must show either actual negligence or conditions which are so obviously dangerous as to admit of no inference other than that of negligence. By the common law of England the fact of an accident having happened to a servant while working for his master in no case affects or raises the presumption that the servant has a claim against his master for fault or compensation. The authorities are all cited by Mr. Abbott, *Slater and Second*, 2298. Where circumstances proved are of a neutral character, evidence of opinion is sometimes given to point their contentence or in contentence. *Medford Ry. Co.*, 57 L. J. 811. The maxim *res ipsa loquitur* does not apply to an accident on a highway. *Kitchin v. Ryland*, 1 L. R. 115, 286, per Blackburn, J. Neglect of this principle is perhaps at the root of much non-*res ipsa loquitur* about motor-cars. In this connection attention may be drawn to an error which regards an occurrence as a nuisance which may not be treated as a negligent act. A nuisance is a continuum with a negligent act. *L. & N. W. Ry. Co.*, 11 L. J. 211, 227, per Byles, J. The view taken here could not in any possible case be treated as a nuisance. It was one of negligent negligence. The doctrine applies can have been used to contend that a negligent act may constitute a nuisance, and *Midwood v. Mayor, &c. of Manchester*, [1902] 2 K. B. 507, has been given as authority. But that *Callin v. M.B.*, at 100, states the basis of decision to be that there was a gradual accumulation of explosive gas brought about by the fusion of the bitumen by the operation of the overheated electric wires, which process went on for some three hours, and ultimately resulted in an explosion.

(a) *Byrne v. Boadle* (1863) 2 H. & L. 522. The distinction between this case and *Hammaker v. White*, 11 C. B. (N. S.) 588, is that in *Hammaker v. White* all care had been used, and the accident happened from an unknown peculiarity in the house. (c) *Blower v. G. W. Ry. Co.*, L. R. 7 C. P. 656, and *Kendall v. L. & S. W. Ry. Co.*, L. R. 5 Ex. 371. In the present case, if care had been used, in the ordinary course of things, the accident would not have happened.

(b) *Scott v. London and St. Katharine Docks Co.*, 3 H. & C. 596. Nevertheless, *Fair v. C. J.*, and *Mellor v. J.*, could not find reasonable evidence of negligence in these facts.

(c) *Buggs v. Oliver*, 4 H. & C. 103. *Martin, B.*, dissented from this decision. He thought the fallacy underlying the case was an assumption

- **Chap. III.** Plaintiff injured by a jolt of the train in which he was a passenger. The jolt is caused by the train going against two stationary buffers. Evidence is given that the train ought to have been brought up without the jolt. The mere fact of the happening of the accident is sufficient to entitle the plaintiff to have his case submitted to the jury. (a)

PROPOSITION XX

If fault is not presumed it must be shown. Where evidence is equally consistent with either negligence or no negligence, it is not competent for the judge to leave the jury to find either alternative. The plaintiff must be taken to have failed to establish a case. (b)

Illustrations

On a dark night in a storm of snow a woman endeavoured to cross a London thoroughfare. She passed the line of direction in which an omnibus of the defendant's was going, then becoming alarmed at the approach of another vehicle she turned back and endeavoured to regain the pavement. The horses of defendant's omnibus knocked her down and the wheel passed over her. There is no evidence of a breach of duty fit to submit to a jury. (c)

Plaintiff, while lawfully walking on the foot pavement of a public thoroughfare, is knocked down by a horse driven by the defendant's coachman. Plaintiff's wife sees how that the horse had bolted and the defendant's coachman had lost all control over it. The cause of the bolting is not known. In these circumstances there is no evidence of negligence to submit to a jury. (d)

that the plaintiff should be excused from proving negligence, because the person who really knew whether there was negligence or not was the defendant's servant. (e) *Williams v. The East India Co.*, 3 East, 192.

(a) *Barke v. Manchester, Sheffield and Lincolnshire Ry. Co.*, 22 L. T. (N. S.) 442.

(b) See per Williams, J. *Cotton v. Wood* (1844), 29 L. J. C. P. 233 at 335, per Lord Halsbury, C. *Wakelin v. L. & S.W. Ry. Co.*, 12 App. Cas. 41 at 41, especially the High C. of A. case, *Powell v. McGlynn and Bradlaw*, [1902] 31 R. 134.

(c) *Cotton v. Wood*, 29 L. J. C. P. 333, *Mitchell v. Glamorgan Coal Co.*, 23 T. L. R. 688, *Harris v. Tunn*, 5 T. L. R. 221.

(d) *Manion v. Douglas*, 6 Q. B. D. 145. See also *Williams v. G. W. Ry. Co.*, L. R. 9 C. P. 157.

A person goes to a railway station to inquire about the departure of trains. He is referred by a porter to a time table hanging in a portico in the station. While looking at the time-table a plank and a roll of zinc fall through a hole in the roof and injure him. In an action against the railway company the injured person cannot succeed on these facts in getting his case to the jury. *a*

Chap. III.

Builders, having finished the outside of a house, remove the outer boarding and employ a sub-contractor to do the internal plastering. One of the sub-contractor's men walking along a plank shakes it so as to cause a tool to fall out of window and to injure a passer-by. The falling of the tool is not a probable accident that might have been foreseen so to impose a duty on the builders to guard against it. *(b)*

Whilst defendant is gratuitously conveying his servant to his place of work the horses and front wheels of defendant's carriage separate from the hinder wheels. The plaintiff (the servant) is seriously injured. The carriage was regularly examined by a blacksmith every three months. The above facts do not disclose a *prima facie* case of negligence. *(c)*

PROPOSITION XXI

A mere surmise that the defendant's conduct points to default does not entitle the plaintiff to have his case left ^{Rebuttal or evidence not enough.}

(a) *Wellfare v. L. & N. Ry. Co.*, 1 R. 1 Q. B. 693. If the man who dropped the plank was a servant there was not enough evidence that he was negligent. But the probability is that he was the servant of a contractor for whom even if negligent the railway company would not be liable. Again, the probability is not that the roof was so out of repair as to render it dangerous to send a man on it. If it were true, the plaintiff should show it, further, the fall might be due to a mere accident. *Cp.*, *per Bramwell, B.*, in *Lat. v. Midland Ry. Co.*, 30 L. T. (N. S.) 529 at 531. *Kearney v. L. & S. C. Ry. Co.*, 1 R. 5 Q. B. 414 in 18 Ch. 6 Q. B. 759, is distinguishable from *Wellfare's* case in that there it was the duty of the defendants to inspect the bridge, from a part of which the plank causing the plaintiff's injury fell. *Cp.* *Tarry v. Ashbrok*, 1 Q. B. 1131, *per Blackburn, J.*, at 819, as to liability for "a latent defect which he could not discover." See also *Davison v. Henderson*, 22 R. 114.

(b) *Pearson v. Cox*, 6 D. D. 389, *ante*, 71, *Black v. Christ Church Finance Co.*, [1894] A. C. 18. See also *Higgs v. Maynard*, 12 Jur. (N. S.) 705, where a ladder falling through a window was held not evidence of negligence since it was "not necessarily an event occurring in the course of the defendant's business." A sufficient reason would have been the other reason given for the decision "the ladder was not shown to have been under the management of the defendant or his servants."

(c) *Moffatt v. Bateman*, 14 R. 3 P. C. 115.

Chap. III. to the jury; he must give evidence of some specific negligent act or omission. (a)

Illustrations.

On the platform of a railway station there are two doors, one of which is marked "For Gentlemen," has a light over it, and leads to an ural. The other, which is marked "Lamp Room," is open, has steps down stairs made and no lamp over it. The plaintiff, who could not read, asks his way to the ural of a changer, then going in a hurry through the door of the lamp room falls down the steps. In an action against the railway company on proof of these facts the plaintiff is not entitled to recover. (b)

On the platform of a railway station there is a portable weighing machine used for weighing passengers' luggage, and which has stood against a pillar. Passengers had passed it in going to and coming from the trains, for about five years without any accident occurring. The load of the machine projects about six inches above the level of the platform. Plaintiff is driven by the crowd on the platform against the machine, catches his load, and falls over it. The above facts do not suffice to found a case of negligence against the railway company. (c)

An ownerless dog by some unexplained means gets upon the platform at a railway station. At nine o'clock in the evening he attacks a woman

(a) In *Lovogrove v. L. & N. Ry. Co.*, 16 C. B. (N. S.), at 692, Willes, J., said: "It is not enough for the plaintiff to show that he has sustained an injury under circumstances which may lead to a suspicion, or even a fair inference, that there may have been negligence on the part of the defendant; he must go on, and give evidence of some specific act of negligence on the part of the person against whom he seeks compensation." Willes, J., considers the question of the sufficiency of a scintilla of evidence in *Ryder v. Wombwell*, L. R. 3 P. 32, at 39. See also per Lord Hatherley, in *Donlin, Wreghitt and Wensford Ry. Co. v. Shalvey*, 1 App. Cas. (H. L.) at 1171. "For weighing evidence and drawing inferences from it there can be no canon. Each case presents its own peculiarities, and in each common-sense and shrewdness must be brought to bear upon the facts elicited." Phipson, *Evidence* (11th ed.), 125. Mr. Phipson informs me that the correct reference for this is per Finch, J., in the *Queen v. Madhub*, 21 W. R. (H.) 13, 19. Cf. per Lord Blackburn, *Lord Advocate v. Lord Blantyre*, 3 App. Cas. at 712. "To the proposition in the text exacting specific evidence of negligence to found a case, the Privy Council in *McArthur v. Dominion Cartilage Co.*, 1905, A. C. 72 makes an exception: "when the accident causing the injury is the work of a moment, and the eye is incapable of detecting its origin or following its course." It cannot be of universal application or ultra destruction would carry with it complete immunity for the employer." This case is examined in detail, *Beven, Negligence* (3rd ed.), 615.

(b) *Toomey v. L. & N. Ry. Co.*, 27 L. J. C. P. 39.

(c) *Corrigan v. Eastern Counties Ry. Co.*, 4 H. & N. 781. "It was incumbent on the plaintiff to give 'reasonable evidence'" per Willes, J., at 808.

there and tears her dress. Nothing more is seen of the dog until about half-past ten. Then he is seen attacking a cat belonging to the station, and the porter kicks him out. He runs along the line, escaping the porter's observation among the crowd on the platform where ten minutes later he bites another woman. She brings an action. A nonsuit is refused. The jury in answer to questions left to them find that the dog is a ferocious and dangerous animal, that the servants of the railway company had notice of his attack on the woman earlier in the evening, and took no measures to prevent a recurrence, and that through the negligence of the company's servants the station is dangerous to persons lawfully coming there. The Court on appeal orders a nonsuit, on the ground that the facts disclose nothing which the defendants might have done and which they omitted to do to prevent the accident. The facts are consistent with the absence of the dog from nine o'clock till half-past ten. (a)

A passenger on a railway gets up from his seat, puts his hand on the bar which passes across the window of the carriage with the intention of looking out to see the lights of the next station. The pressure causes the door to fly open. The passenger falls out and is injured. The want of an adequate fastening to the door is evidence of negligence which must be left to the jury. (b)

Sugar shipped sound under a bill of lading is converted into syrup as it is packed before the end of the voyage.

The shipowner is not liable, because the result is consistent with the occurrence of storms which might occasion the injury without any want of care on the part of the captain or crew.

Sugar shipped sound under a bill of lading is converted into syrup before the end of the voyage. It is further proved that the damage is done by fresh water.

The shipowner is liable, for then the proper duty is that the damage had been caused by him through leaving open the hatches. (c)

(a) *Smith v. L. Ry. Co.*, 1 L. R. 217 (P. 10). The canon of evidence was thus formulated by Willes, J.: "It is not enough to show that the damage may have occurred through the negligence of the defendants' servants, even coupled with the suggestion that no sufficient explanation was given of the dog's conduct. The plaintiff must show something which the defendant might have done and which they omitted to do, before they can be held responsible for the misfortune which has happened." Probably a more accurate expression would be not "might have done," but "were under a legal duty to the plaintiff to do," as to take off ordinary and reasonable precautions, (p. *Allen v. New Gas Co.*, 1 Ex. D. 251).

(b) *Gee v. Metropolitan Ry. Co.*, L. R. 814, B. 161, *Hobson v. North-Eastern Ry. Co.*, L. R. 10 Q. B. 271.

(c) *Czech v. General Steam Navigation Co.*, L. R. 3 C. P. 14, per Willes, J., at 19.

Chap. III.

PROPOSITION XXII

Well-defined
negligence.

A "specific negligent act" within the meaning of Proposition XXI (a) is shown by evidence from which a reasonable probability may be inferred, that the injury sued on results from the absence of some precaution which the defendant ought to have taken, and an indication with reasonable certainty what particular precautions should have been taken. (b)

Illustrations.

Children get on a railway line. It is not shown how. They are sitting upon the parapet of a small wooden bridge when a train comes along, and, in passing, cuts off the leg of one of them a child of three and a half years old. There is no evidence of negligence to charge the railway company. (c)

A child four and a half years old is found lying on the level crossing of a railway, a foot having been cut away by a passing train. The railway company have neglected their statutory duty to protect the crossing. There is evidence of negligence to charge the railway company. (d)

A man living near a railway crossing, and conversant with the practice of signalling at the crossing, calls at the gatekeeper's lodge on a December night. As he leaves the lodge to cross the line a train is signalled. The gatekeeper does not mention this, and does not go on the line and show a light, as is his duty. The man proceeds to cross the line, is struck by the train and killed. There is a case of negligence to go to a jury. (e)

(a) *Ante*, 78

(b) See per Willes, J., *Dunlop v. Metropolitan Ry. Co.*, L. R. 8 C. P. 216 at 229, also per Pollock, B., *Williams v. G. W. R. Co.*, L. R. 9 Ex. 157 at 161.

(c) *Singleton v. Eastern Counties Ry. Co.*, 7 C. B. (N. S.) 237.

(d) *Williams v. G. W. Ry. Co.*, L. R. 9 Ex. 157.

(e) *Smith v. N. E. Ry. Co.*, 1880, 1 Q. B. 178. *The absence of a light when there was accustomed to be one raised the probability that the accident was caused thereby. Had the precaution of showing the light been taken the company would have discharged their duty. The contention of the defendants was that the display of the light was for the purposes of the company, and was not in respect of a duty to foot passengers. Two of

PROPOSITION XXIII

He who tampers with the evidence bearing on the matter in issue has every presumption, arising from defective testimony caused by his act, made against him.

Presumption against suppressor of evidence.

Omnia presumuntur in volum spoliatoris. (a)

A chimney-sweeper's boy found a jewel and took it to a goldsmith's. The apprentice, under pretence of weighing it took out the stones, and calling to the master to let him know it came to three half-pence the master offered the boy the money. The boy refused to take it, and demanded his jewel back. The apprentice then gave him back the basket without the stones. Unless the master produces the stones as against him they are to be presumed of the most water. (b)

Illustrations.

the judges in the Court of Appeal appear to hold, though with some circumspection, that there was a duty to the public generally. Lord Fisher, M.R., considered the fact of duty or no duty immaterial. He considered "there was evidence from which the jury might infer that he (the man killed) knew that Jones's true duty was to perform the service, which I have mentioned, for the company, whenever a train was passing over the crossing, and that being so, the inference on the evidence takes the view that under the circumstances it was not a won't or could care on the part of the deceased to presume that as Jones remained in his house, no train was coming, and therefore he might go over the crossing in safety without taking the precaution of looking up and down the line, or any other such precaution as might otherwise be necessary." All this being "the deceased man lived in the neighbourhood, and had been at the crossing on previous occasions." On the hypothesis that there was a duty to the general public this is undoubtedly a malum in se delict in North-Eastern Ry. Co. v. Wainless, L.R. 7 H.L. 42. Assuming there is no duty, it is a very hard saying. The law on the point is clear. If a person undertakes to perform a voluntary act he is liable if he performs it improperly, but not if he neglects to perform it. Such is the result of the decision in the case of Coggs v. Bernard. (per Willes J. Skelton v. London and N.W. Ry. Co., L.R. 2 C.P. 611 at 646, *ex post* Lord Fisher, in London and India Dock Co. v. Commissioners, L.R. 5 ex. 381. See also Woodley v. Metropolitan District Ry. Co., 2 L.S.D. 381. See also per Lord Fisher, M.R., in Le Mesurier v. Gould, [1893] 1 Q.B. 691 at 695. Angell v. London, Tilbury and Southend Ry. Co. 22 F.T.R. 222, is commented on adversely to the decision, in Deven, Negligence (2d ed.), 141, where Smith v. S.E. Ry. Co. also is examined, *ex post* Gray v. Hoag, 20 Bay. 219.

(a) Broom, Maxims (6th ed.), 892, Chubb v. Sashly, Vern. Case 203.

(b) Annuery v. Delamare, 1 Strongs 591, 9 Sm. L.C. (11th ed.) 376. "A spoliator must expect that every possible inference will be drawn against him." per Lord St. Leonards, Stanton v. Percival, 5 H.L.C. 257 at 261. *Ex post* Lord Lyndhurst. "If a man withhold documents which are material to be produced on an investigation everything will be presumed against him." Attwood v. Small, 6 Cl. & F. at 112.

Chap. III. A workman sues for injury caused by the breaking of a chain. The defendant's manager has thrown away the broken parts. A presumption of negligence is to be drawn from the act. *a*

PROPOSITION XXIV

The inference
of negligence
is for the jury

Where there are facts from which negligence *can* reasonably be inferred, the case must be submitted to the jury to say whether it ought to be inferred

Illustrations.

A train drew up at a station so that the back part remains in a tunnel where there is no platform. A short-sighted passenger in the back part of the train gets out on hearing the name of the station called. He falls on a heap of dry rubbish and sustains injuries. The passengers are subsequently called on to keep their seats, but not till another passenger has got out. Hearing a groan he goes into the tunnel and finds the deceased. The case must go to the jury. *b*

A railway carriage is filled with more passengers than its complement. At the next station after the excessive number have entered just as the train is starting, the door of the carriage is opened by persons trying to get in. A passenger thereupon partly rises and holds up his hand to prevent more people entering. As the train moves the motion causes the passenger to fall forward. He puts his hand on one of the hinges of the carriage door to save himself. At the same moment a porter pushes away the people and slams the door to, crushing the passenger's thumb. Negligence is not shown. *c*

PROPOSITION XXV

Conflicting
testimony for
the jury

When evidence has been given from which negligence may reasonably be inferred, and subsequently on behalf

(a) Rooney v. Allan, 10 R. 1221 at 1227. That, too, if one withholds an agreement under which he is chargeable, it is presumed to have been properly stamped till the contrary appears, Crisp v. Anderson, 1 Stark (N. 1) 35.

(b) Bridges v. North London Ry. Co., L. R. 7 H. of L. 213.

(c) Metropolitan Ry. Co. v. Jackson, 3 App. Cas. 193.

of the other party to the suit other evidence, is given **Chap. III.**
 inconsistent with the first, the decision which is more
 credible must rest with the jury; and the duty of the
 judge is confined to pointing out to the jury the con-
 siderations that should guide them in their findings, and
 the consequences respectively attaching to them. (a)

A man is knocked down and killed by an express train while lawfully **Illustration.**
 crossing the line in a station. His widow sues the railway company in
 respect of his death. The negligence alleged against the company is
 default in the driver of the express train in not whistling on approaching
 the station. It is a rule of the line for the express train always to whistle
 on approaching the station. Two witnesses for the plaintiff say they did
 not hear a whistle, and one that he did not hear a whistle but could not
 swear that there was no whistling. On the part of the defendants the
 driver of the train swears that he whistled twice. Nine other persons,
 'including every person who could be supposed to have been material
 all of whom seem to be entirely unimpeached and unimpeachable,' *b*
 said they heard the whistling. The opinion of the jury must be taken on
 the evidence. *c*

PROPOSITION XXVI

When the plaintiff by his evidence succeeds in bringing ^{that not self-}
 home negligence to the defendant, but shows also that he ^{destructive}
 himself caused the accident through omitting to use ^{testimony.}
 reasonable care, his case fails.

Plaintiff sues in respect of injuries received through being knocked **Illustration.**
 down and injured on a level crossing of a railway by a train. The plaintiff
 by his evidence in effect states "that he himself caused the accident by
 walking straight into a train which he might have seen." It is the judge's
 duty to nonsuit. *cf.*

(a) As to the last clause, see per Lord O'Hagan, 3 App. Cas. at 1185

(b) Per Lord Cairns, C., 3 App. Cas. at 1164

(c) Dublin, Wicklow and Wexford Ry. Co. v. Slattery, 3 App. Cas.
 1155.

(d) *Davey v. L. & S.-W. Ry. Co.*, 11 Q. B. (1) 213, 12 Q. B. D. 70.
 The quotation is from the judgment of Lord Coleridge, C.J., 11 Q. B. D. at

Chap. III.

PROPOSITION XXVII

Nervous shock

A negligent act producing nervous shock to the plaintiff and, in natural and ordinary course, causing actual physical injury (or) is a violation of a legal right and actionable, even though no actual physical impact occurs.

Illustrations

A man by way of practical joke reports to a woman that her husband is seriously injured. The shock of the announcement is such that the woman becomes temporarily ill. Her illness is not in any way the result of previous ill health or weakness of constitution, but the natural effect of the action. He is liable for the consequences of his action. *h*

A pregnant woman is in her house. Defendant negligently drives that his horse's head appears in the door and causes the woman such a shock that she is prematurely delivered. She has a right of action against the defendant. *e*

217. The decision in this case has been cited by Lord Esher, M.R., in *Walsby v. L. & S.W. Ry. Co.* (1896) 1 Q.B. 84, 190. I do not retract any part of the statement which I made in the case of *Duggan v. L. & S.W. Ry. Co.* as to the principle of law in reference to the right of the cause of action in case of the first.²

(d) See per Pallmer, J.B., *Bell v. L. & S.W. Ry. Co.* (1894) L.R. 26 C.L. 128 at 131.

(e) *Willmes v. Bowton* (1896) 2 Q.B. 57. Reference to the various authorities on both sides of the decision of the present case is to be found in Wright, J.'s judgment, and in the notes to the report. Victorian Railway Commissioners v. *Loch*, 13 App. Cas. 122 is in any event wrongly decided, since the facts prove that a culpable mistake was made. See per Hedderley, J., *Edwards v. Melbourne and Metropolitan Board of Works*, 17 V.L.R. 11, 132 at 131. Cf. *Rea v. Richmond New Ferry Co.*, 17 N.S.W.R. 41, 92. Wright, J.'s explanation of the ground of decision in *Jones v. Joyce*, and that of his case (itself) if it explain those he mentions, cannot account for the decision in *Conlon v. Thompson*, 29 Paule (N.Y.), 218, where a letter died from sudden fright, caused by the explosion of a racket between children.

(f) *Dubon v. White & Son* (1901) 2 K.B. 649. "The shock may be the result of something calculated to produce a fear of personal injury. Mere violence to one's faith or feelings is not enough, per Kennedy, J., commenting on an unreported case, *Smith v. Johnson* (L. at 66). Phillimore, J., at 684, doubts "whether as between people travelling on highway there is any duty so carefully to connect oneself or your vehicle as not to frighten others." Plainly not so stated. But there is a duty, e.g., not to drive furiously. If in breach of this statutory duty (21 & 25 Vict. c. 104) see (b) if a man causes injury to another, why should a wrongful act have different consequences on a highway than elsewhere? Cf. *Cooper v. Caledonian Ry. Co.*, 4 F. 850.

CHAPTER IV

CONTRIBUTORY NEGLIGENCE

PROPOSITION 1

CONTRIBUTORY negligence is negligence produced by such want of care of the person suffering the injury as, in co-operation with negligence of the person sought to be charged, in natural and ordinary sequence (*(a)*) jointly occasions (*(b)*) the injury complained of.

A man picks up an old woman in the public street. Another, who is riding him on his cycle, meets it without observing it, and falls with his head and arms very much hurt. He is guilty of contributory negligence.

[*(a)* If a man's hand dived on the road, another is not necessarily to drive over him. If that happens the driver cannot be held liable for the injury, but would not have occasioned the injury." per Coleridge, L., *Overalls v. Dutton*, 13 Q. B. 434 (64).]

[*(b)* Contributory negligence may be proved as a cause of negligence, where the injury is limited to a case, one to which of two or more persons declare guilt, of which cases the negligence is due. In a case where negligence is the act of the person, the negligence is shown by certain facts can be proved or not, and whether when proved they show a breach of duty concerning duty, or not, in person and ordinary sequence.

[*(1)* "And only," in the report.

[*(2)* *Butterfield v. Foresters, H. East* (1) 10 R. R. 133 (see per Lord Esher, M.R., in *The Formula*, 12 P. D. 55 at 50). In the same case, at 61, Lord Esher, M.R., enunciates the following two propositions:—“(5) If, although the plaintiff was himself or his servants guilty of negligence, such negligence did not directly participate in the accident, as if, for example, the plaintiff or his servants having been negligent, the alleged wrongdoers might by reasonable care have avoided the accident, the plaintiff can maintain an action against the defendant.” (6) If the plaintiff has been personally guilty of negligence which has partly directly caused the accident, he cannot maintain an action against any one.”]

Chap. IV.

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A barge goes down a river with two men on board, one at the helm but with no look-out. A steamer on her right side, and taking such precautions as would have avoided a collision had the barge duly taken similar precautions, runs into the barge and causes injuries, for which redress is sought. If the defendant can establish to the satisfaction of the jury that by omitting to keep any look-out the plaintiff contributed to the accident, he is entitled to a verdict for

PROPOSITION II

Constituents.

Where a defendant is shown to have been guilty of negligence, and the plaintiff is also shown to have been guilty of negligence in the same particular, the plaintiff is still entitled to recover against the defendant unless it further appears, either.

- (1) That the plaintiff might have avoided the consequences of the defendant's negligence by the exercise of ordinary care; (b) or
- (2) that the defendant could not have avoided the consequences of the plaintiff's negligence by the exercise of ordinary care. (c)

(a) *Tuff v. Warman*, 2 C. B. (N. S.) 510, 5 C. B. (N. S.) 573. See per Cockburn, C. J., 2 C. B. (N. S.) at 755. There is some slight verbal inaccuracy in the expression of Cockburn, C. J.'s, opinion. He seems to assume that if there is negligence it must be a proximate cause of the damage. But this is not necessarily so. There must be (1) Evidence of negligence, (2) Evidence of proximate causation. Both these questions are for the judge to determine, (3) The jury must say whether there is negligence, and what its actual results are. See *ante*, 65. *Post*, 81. *Reynolds v. Tilling, Ltd.*, 20 T. L. R. 57.

(b) See per Parke, B., *Bridge v. The Grand Junction Ry. Co.*, 3 M. & W. 214. In *Walton v. L., B. & S. Ry. Co.*, 11 A. R. 124, at 129, Willes, J., expresses the effect of *Tuff v. Warman*, 2 C. B. (N. S.) 510, 5 C. B. (N. S.) 573, to be that the use of the word "directly" before "contributing to" the accident was not wrong as imputing the kind of negligence on the part of the plaintiff which would disentitle him to recover against the defendant.

(c) See per Lord Penzance, *Radley v. L. & N.-W. Ry. Co.*, 1 App. Cas. 734 at 739.

(1) A party having set a spring gun in his garden, of which he gives no notice, the plaintiff enters the garden in pursuit of a strayed fowl, and is wounded by the gun. He can recover in respect of his injury. Chap. IV.
Illustrations. •

A contractor acting under the contract with a local sewer authority to deepen a sewer in order to make a drain to a mews, digs a trench down the only passage leading to the mews. This opening is not filled. Notice of it is given to the occupiers of stables in the mews. A cab proprietor having stables there wishes to get one of his horses out, and endeavours to lead him over the heap of earth and gravel thrown up on one side of the trench to a height of four feet. To do this is safer than to lead the horse along the other side of the trench, which is much narrower. The horse falls into the trench, and is changed in an endeavour to drag him out with ropes. The cab proprietor is entitled to recover for his loss. *b*

Two steamboats are making for the same port. The one strikes the other on the bow where the anchor is carried. A passenger is in the same place, and is injured through the fall of the anchor. Assuming the anchor to be negligently placed, and the passenger wrongfully where he is, he can still recover against the owner of the other steamboat, for he could not avoid the consequences of the defendant's negligence by the exercise of ordinary care. *c*

(a) *Third v. Hollbrook* (1828), 1 Binn. 628, 20 B. R. 167.

(b) *Claydon v. Dehick*, 12 Q. B. 131. The negligence of the defendants was leaving the excavation without a proper fence. The question in dispute was whether the plaintiff might have avoided the consequences of the defendant's negligence by the exercise of ordinary care. This question the jury answered in the plaintiff's favour. Bramwell, L. J., canvassed the justice of this conclusion. See *Lax v. Corporation of Dorking*, 5 Ex. 11, 28 at 31. *McMahon v. Field*, 7 Q. B. D. 591 at 591, and Appendix to Smith, *Negligence* (2nd ed.). He concluded that the only ground on which the case could be sustained was that the risk was not an obvious one. Bramwell, L. J.'s dissent was due to his views on the application of the maxim, *Volenti non fit injuria*, as to which see Smith *v. Baker*, [1891] A. C. 325, and *ante*, 12 and 17. It seems plain on principle that a person is not to be paralysed in the exercise of his legal rights of property merely by a wrongdoer claiming to act negligently. If the danger from acting appears merely possible and a safe event possible, the right to act even at the peril of the wrongdoer would remain, provided the action was taken with all ordinary care to avoid the consequences of the other party's wrongful act. *Claydon v. Dehick* has been followed in *Thompson v. N. E. Ry. Co.*, 2 B. & S. 106, see per Blackburn, J., at 118, and in *Wyatt v. G. W. Ry. Co.*, 15 B. & S. 700.

(c) *Greenland v. Chapman*, 5 Ex. 213. This is contrary to the direction given to the jury. The learned judge at the trial, Pollock, C. B., was also the judge who delivered the judgment of the Court, when he recanted his earlier opinion and joined with the rest of the Court in holding that "a person who is guilty of negligence, and thereby produces injury to another, has no right to say, 'Part of that mischief would not have arisen if you

Chap. IV. A passenger on an omnibus which was riving with another omnibus, is injured by reason of the wheel of the omnibus on which the passenger is not riding coming in contact with a projecting step of the omnibus on which the plaintiff is riding. The collision is occasioned in trying to avoid a cart. Both omnibuses are being driven hurriedly but it does not appear that the one on which the passenger—the plaintiff—is could avoid the swerving of the other, while it is impossible for the driver to pull up. The plaintiff is entitled to recover. *Id.*

(2) Plaintiff having fettered the forefoot of an ass belonging to him, turns it upon a public highway. While the ass is grazing on the offside, the defendant's waggon with a team of three horses coming down a slight descent at "a snail's pace" runs against it and kills it. The defendant could with ordinary care have avoided the consequence of the plaintiff's negligence. He is therefore held. *Id.*

A sailing collier vessel and a steamer come into collision on a dark and rainy night in the Thames. The collier exhibited a light, but had withdrawn it for two or three minutes before the accident, and she is not visible to those on board the steamer till she is within two or three lengths of the collier. In withdrawing the light the collier is in fault, and directly contributes to the accident. The steamer is going at too great a speed on so dark a night, but when the steamer comes within two or three lengths of the collier it is impossible to avoid the accident, though the preponderance of blame is with the steamer. The owner of the collier sues the owner of the steamer. The steamer could not with ordinary care avoid the consequence of the plaintiff's negligence. The plaintiff can recover. *e.*

A wharfinger has a wharf to which is adjoined a jetty projecting at high water into the waterway of the Thames. A vessel going up the river

yourself had not been guilty of some negligence.' I think that where the negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action.' It is true that had the passenger not been where he ought not to have been the accident could not have happened. But the passenger was under no duty to the owner of the other steambot to stand in any particular place, while the owner of the other steambot was under a duty not to come into collision. *Id.*, 67.

(d) *Regla v. Hewitt* (1876), 5 Ex. 249. At the time of this and the next decision, reported in the same volume, *Thorogood v. Bryn*, 8 C. B. 115, was still held to lay down good law, that the passenger on an omnibus was in the same situation as the owner of the omnibus on which he was a passenger, so that if the driver's conduct was such as to disentitle the owner to sue, the plaintiff could not recover. For the existing law, see *Mills v. Armstrong* ("The Bertha"), 13 App. Cas. 1.

(b) *Davies v. Mann*, 10 M. & W. 546.

(c) *Dowell v. General Steam Navigation Co.*, 5 B. & E. 135.

with the flood tide, under tow by a steam tug, in avoiding some colliers in the way strikes the petty and does damage. The petty is unlawfully in the waterway. The vessel does not touch the wharf. No agreement is made that it is necessary to pass over the point of the river where the jetty is, or that the river cannot be conveniently navigated without coming in contact with the nuisance. The owner of the vessel is liable, for he could so far as appears avoid the consequences of the plaintiff's unlawful act in obstructing the waterway by the exercise of ordinary care.^(a)

A railway company take full trucks from the siding of a colliery owner, and return empty trucks to the same place in ordinary course of business. Over the siding is a bridge eight feet high. The railway company's servants on one occasion run trucks on the siding after all the colliery men have left work. The first of these trucks contains another truck that has broken down. The point height of the two is eleven feet. Watchmen employed by the colliery owner know of the trucks being in the siding, and of the probability of more being run on the siding, yet nothing is done, and the broken-down truck is left. Subsequently more trucks are run on the siding, and push forward the already there. Some extra resistance being felt additional force is used, with the result that the broken-down truck is thrust against the bridge and wrecks it. The jury have to say whether ordinary care on the part of those responsible for pushing forward the second lot of trucks would not have made the accident impossible, notwithstanding any previous negligence of the colliery people in leaving the truck containing the broken truck on the line.^(b)

PROPOSITION III

Where the direct and immediate cause of damage is the fault of the defendant, contributory negligence cannot be established merely by showing that, had the plaintiff done something he did not do, the accident might not have happened.

(a) *Dimes v. Potley* (1850), 15 Q. B. 276. A private individual must not abate a nuisance in a public highway of his own authority, unless it does him a special injury. *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

(b) *Radley v. L. & N.-W. Ry. Co.*, 1 App. Cas. 754.

Chap. IV.

Illustrations.

A sailing vessel is taken in tow by a steam-tug. After the tug begins the towing services, the master of the sailing vessel leaves the deck. The tug, under the direction of the ship's pilot, pursues a dangerous course, which, if persisted in, might probably have taken the vessel clear of a dangerous bank. The ship's pilot failing to give further directions, the tug starboarded her helm, causing the sailing vessel to go aground. At the crisis the sailing vessel takes all proper steps. The failure to prevent the tug entering on the dangerous course is not contributory negligence. (a)

Two ships come into collision rounding a point. If one of them had obeyed a rule of navigation she would have been a hundred yards distant from the place of collision. In the existing circumstances the act of the other running where she does is an act of rashness and negligence. The collision is the result. The infringement of the rule of navigation on the part of the first ship is not contributory negligence. (b)

A tug comes into collision with a steamer. The tug receives damage from the anchor of the steamer, which is being carried in a position not allowed under navigation rules. After the negligent act of the tug has produced the risk of collision there is no time to shift the anchor. The negligence as to the anchor is not contributory to the accident, and the owners of the steamer are not responsible for the damage caused thereby. (c)

PROPOSITION IV

Physical incapacity.

Physical incapacity of the injured person, although conducing to the injury, does not of itself deprive such person of his right to recover in respect of the injury.

Illustrations.

An intoxicated man is walking in the roadway. A man driving two horses in a cart without reins, and approaching the man in the roadway at a rapid pace, calls on him twice to get out of the way. From the state

(a) *Spaight v. Todenstle*, 6 App. Cas. 217. In the report the facts are complicated with a question of compulsory pilotage which is here omitted.

(b) *Cayzer v. Carron Col.*, 9 App. Cas. 873.

(c) *The Monte Rosa*, [1893] P. 23. As the three last instances given are Admiralty cases, it may be well to note that, so far as the principle they serve to illustrate goes, there is no distinction between the Admiralty and the Common Law, see per Lord Blackburn, *Cayzer v. Carron Co.*, 9 App. Cas. 873 at 880.

of intoxication in which he is, and the rapid pace of the horses, he is unable to do so. The driver is guilty of manslaughter (a) Chap. IV.

A deaf man is injured through not hearing a car in a cart coming behind him. He can recover, notwithstanding, if in approaching him the man in the cart neglects precautions (b)

PROPOSITION V

An instinctive effort to avoid danger, resulting in injury on the part of one person, and occasioned by the wrongful conduct of another, will not relieve the wrong-doer from responsibility. Instinctive action.

A coach proprietor neglects to provide a proper coupling-iron. The one supplied breaks. In turn, occasioned by the peril he is thus placed in, one of the passengers jumps from the coach and breaks his leg. He is not guilty of contributory negligence (c)

A young woman is killed while endeavoring to drag her companion out of danger from an approaching train. The railway company is guilty of negligence. The young woman's act is not in law contributory (d)

A little child three or four years old gets on a railway track. A train is approaching in circumstances which a prudent man would show negligence. A man springs on the line, throws the child clear, but is killed. His act is not contributory negligence (e)

(a) *Rex v. William Walker*, 1 C. & P. 320. If the intoxication actually contributes to the injury the intoxicated man cannot recover. *Magnus v. Middlesex Rld. Co.*, 115 Mass. 239 at 240.

(b) *McKeehmre v. Cooper*, 34 So. L. R. 252. See too *Anderson v. Blackwood*, 23 So. L. R. 227, and *Smith v. Browne*, 25 L. R. 111. A newspaper report of a case is sometimes cited in county courts in which a very distinguished judge is reported to have said that a driver along a highway, seeing a person in front of him, to fulfil his duty should act as if such person were deaf. This is clearly against both authority and principle. The standards of the law presume ordinary and normal capacity. So soon as the driver has knowledge or means of knowledge of any infirmity or abnormality a greater duty of caution arises, but not till then.

(c) *Jones v. Boyce*, 1 Stark (N. P.) 493. *Ante*, §52.

(d) *Woods v. Caledonian Ry. Co.*, 13 R. 1114.

(e) *Eckert v. Long Island Rld. Co.*, 43 N. Y. 502. The ground for this conclusion has been much debated. If the man's act was instinctive it may be brought under the above principle. "The impulsive desire to save human life when in peril is one of the most beneficial instincts of

Chap. IV.

A boy is working with an "elderly man." He sees a runaway waggon descending upon them and gets out of the way, but attempts to avert the danger to the life of his companion by trying to stop the waggon. He is injured in his attempt. He sues his employers for their negligence in letting the waggon beat a huff. Negligence is admitted. He is entitled to recover (*a*)

PROPOSITION VI

Young
persons.

The rule of law determining liability for cases of contributory negligence does not necessarily apply in the case of "young persons," who are entitled to special consideration. In their case, provided that the defendant is shown to be in default, a "young person" is not precluded from recovering, although guilty of conduct contributing to the injury (*b*)

humanity," says Cockburn, C.J., in *Swainman v. Stamp*, 5 C. P. D. 295 at 301. If the act was motivated by a sense within the principle enunciated by Lord Macnaghten in *Donoghue v. Stevenson*, 1932 A.C. 71 at 77: "To protect those who are not able to protect themselves is a duty which everyone owes to society." While, then, the man was doing his duty the railway company was in default, and escaped from saying they had no duty to him. *Donoghue v. Stevenson*, 1932 A.C. 71 at 73; *Stevens v. M'Kenzie*, 25 V. L. R. 115. In *Crocker v. Johnson*, 50 Am. R. 503 one injured while exposing himself to danger in order to save his property was held guilty of contributory negligence, this is a *fact* as if the property were not his own. In *Pennsylvania Co. v. Langendorf*, 29 Am. St. R. 553, the Court acted on the view that the plaintiff in each seeking to save life was in the performance of a legal act while the wrongdoer was in default. *Cp. Rockwell v. Norwegian Potash Co.*, 111 F. R. 117.

(a) *Willmson v. Kennel Cannel & Coling Coal Co.*, 21 R. 1001. The Scottish judges were divided four against three. *Cp. Rogers v. Thomas* (1899) 1 Q. B. 1010, under the Workmen's Compensation Act, 1897. The cases are collected, *Thibatt, Master and Servant*, 435.

(b) *See per Channell, B. Gardner v. Grace*, 11 F. & F. 301. *Cp. Martin v. Wards*, 11 R. 811, with *Duff v. National Telephone Co.*, 16 R. 675, per the Lord President, at 676. There is difficulty in defining a "young person" within the meaning of the proposition in the text. The English cases do not appear to afford any plain rule. In *Crocker v. Bank*, 1 F. L. R. 824 the Court of Appeal seem to have regarded a girl of seventeen, described as "an expert hand" at her business, as entitled to special protection. *Id. Grizzle v. Frost*, 3 F. & F. 622, the age of the "young person" injured was sixteen. Perhaps to lay down an inflexible rule is impossible. The governing considerations for the determination of the matter are thus stated in the United States: (1) *Prima facie* an infant under the age of ten years has not sufficient capacity to be sensible of danger, or to have the power to

A cart is left unattended. A child of seven gets upon the cart (to play). Another child leads the horse on. The child on the cart is thrown down and hurt. There is negligence in the owner of the cart. The child does as is to be expected from a child of seven. The conduct of the child is not contributory to the accident (a). **Chap IV.**
Illustrations.

On one side of a street there is a footpath; on the other side there is but no footpath, though the public has a right of passage. The occupier of a house and cellar on this side takes off the flap or cover of his cellar, and places it against his wall nearly upright, so that it can easily be pulled over. The flap is pulled over by a child of seven years old by playing on it and jumping from it, when it falls and hurts him severely. The flap is placed negligently, but the child's act is held contributory negligence (c).

avoid it. The presumption under this act will continue till proof having the contrary. (2) *Prima facie* an infant upwards of the age of fourteen years has sufficient capacity to be conscious of danger and to have the power to avoid it. The presumption will continue till evidence to the contrary of the absence of the capacity thus presumed. (3) An infant between the age of ten and fourteen must be shown to have capacity in the particular instance to understand and avoid danger. (4) The law fixes the age of fourteen as the commencement point at which the presumption of capacity is changed, and lays upon the infant the burden of showing his personal want of the faculties needed at the time. See *Bishop v. County Rd. Co.*, 20 Am. St. R. 362, 10 *Edw.* 583; *Schulz v. School*, 111 Pa. St. R. 58, 7 Am. St. R. 633; *op. Shupe v. Pottsville Spinning Co.*, 12 B. 571. In *Grant v. Caledonian Ry. Co.*, 9 Macph. 68, it was held that a child of seven years contributed to negligence by an injury to it in a motor car. *Bos. & B. R.* 725, a child of seven was held not contributorily negligent. In *Reynolds v. W. H. Smith*, 17 T. L. R. 420 the child was twelve the M.P. car was not sufficient to show that the child knew of the danger, but there was a duty on the master to order the child when ready to order to keep out of the danger. The duty of a defendant where a "young person" within the rule is concerned is to be free from fault. (5) 1909.

(a) *Lynch v. Nurdin*, 11 Q. B. 29, *op. cit.* 1 *Medley R.* 100, 41 L. J. (N. S.) 901. Lord Esher M.R. assumed that *Lynch v. Nurdin* and *Mumford v. Ward* 8 T. L. R. 1091 was perhaps a slip. The case of *Mumford v. Abington* was probably the one intended to be distinguished. See *Clay v. Chambers*, 11 Q. B. 11, 327 *ed. 338* (Union Fidelity Ry. Co. v. McDonald) 173 U. S. (45) *Davis* 262, *per* Harlan, J., at 261, and Smith, J., in *Harbold v. Watney*, 1898, 212 B. 320 at 323. The defendant's car on the ground that the cotton fence standing on the highway constituted a danger to those using the highway—that is it constituted a nuisance. *per* Williams, J., at 321. However, see *Logan v. Newbold*, 94 L. 302 *per* Alderson, B., at 305.

(b) *Hughes v. Mather*, 2 H. & C. 711. In *Lindley v. Angus*, 14 R. 312, a shutter fastened by a bolt was modified with by children, and fell, injuring one. The owner of the shutter was held liable, though the Court were of opinion that the protection afforded was enough "if not tampered with in respect of any ordinary pressure that might be exerted." In *Duff v. National Telephone Co.*, 16 R. 1675, the owner of a harrow had left it in a lane in a town. Children began to play with it, and one of them was injured. On the assumption that leaving the harrow unattended was in the circumstances not negligence, the owner of it was not liable for the

Chap. IV. A machine for crushing oil-cake is left standing in the street and without superintendence. The cogs which work the crushing rollers are exposed, and the handle is not secured. By direction of his brother a child of four years old who is passing puts his fingers in the cogs and gets them crushed. An action is held not maintainable, *ac*

A cellar adutting on a highway is used for scene painting. The area over the cellar is open, and there is a protecting bar round the opening. A little girl is leaning against the rail looking down into the cellar at the scene painters at their work, falls into the area, and is injured through the giving way of the railing. The child's conduct does not disentitle her to recover in a case where the defendants are at fault in not having a sufficiently strong railing (*b*)

Merchants receive their goods into their warehouse through an aperture in the wall, which is three feet six inches from the ground. About two feet from the outer edge of the sill inside the aperture there is a lift. On the wall outside is a notice to the effect that the place is dangerous. A child eight years old climbs up on the sill and leaning forward to see what is inside is struck on the head and injured by the descending lift. The merchants are not in default and the child cannot maintain an action, *ac*

A street roller with reversible shafts is left standing in a street secured by a strong rope which would have held it immovable. Two children meddle with it. One cuts the rope, and the fingers of the others are crushed in the reversible shaft. Those responsible for the roller have

accident. The legality of leaving a barrow unattended must depend on the circumstances, *see* *Hodge v. Goodwin*, 5 C. & P. 181, and *per Smith J.*, *Tolhausen v. Davies*, 57 L. J. Q. B. 392. *James v. Fire Coal Co., Ltd.*, 3 F. 335, is a "strong" decision even for a Scottish Court. It is difficult to understand how the plaintiff could recover if he were guilty of negligence, or how the defendants were liable if they were not. *Horsburgh v. Shonch*, 3 F. 268, is in line with the best authorities, English and American. *See Ross v. Keith*, 16 R. 86 and *ant.*, 71

(*a*) *Mangan v. Atterton*, L. R. 1 Ex. 289, *cp* *Campbell v. Oid*, 1 R. 149. *Mangan v. Atterton* as it stands is in decided conflict with other cases. *See* *Clark v. Chambers, supra*, and *Wharton, Negligence* (2nd ed.), § 820. The decision may perhaps be supported on the ground that it was market day when the accident happened, and that the place where the machine was exposed was within the limits of the market, and consequently the defendant was not in fault.

(*b*) *Jewson v. Gith*, 2 T. L. R. 441. This is a decision of the Court of Appeal. A ground of the decision was that the painting was a positive allurement to children. *Cp* *Harrold v. Watney*, [1898] 2 Q. B. 320.

(*c*) *Stiefsohn v. Brook*, 5 T. L. R. 684, a ruling of Fry, J. J. 8.

been guilty of no negligence, and therefore the child has no right of action. (a) **Chap. IV.**

Children trespass. They get on to a train of a railway company, through a gap in a hedge which it is the statutory duty of the railway company to keep "good and sufficient" as an approach to a bridge. They then go down a slope to a tunnel, which they set in motion, one of them riding on it. He is injured. There is no causal connection to render them liable because of the breach of duty of the railway company and the accident. As regards the accident, they are not in default. (b)

PROPOSITION VII

Where an infant in arms, or a person in charge of another unable to protect himself, is injured by reason of the negligence of the person, in whose charge he is, co-operating with the negligence of some third person, in such circumstances that the negligence of the person in charge amounts to contributory negligence, the infant in arms or person in charge has no right of action in respect of the injury caused to him against such third person. (c)

A woman carrying an infant of five years old took a half-ticket for the child and a ticket for herself to travel by railway. It is necessary to cross the line on the level to get to the departure platform. The woman with the infant attempts to cross the line, but she is knocked down by a

(a) *Bailey v. Neal*, 5 T. Tr. R. 20; *McGowan v. Ross*, 10 R. 725; *Slade v. Victorian Railway Commissioners*, 15 Vict. L. R. 190.

(b) *Cooke v. Midland G. W. Ry. Co. of England*, 1908, 21 R. 242.

(c) See particularly the judgments of Pollock, C.B., Willes and Crowder, JJ., and Bramwell, B., in the Ex. Ch. in *Wagge v. N.E. Ry. Co.*, 15 B. & L. at 733 *et seq.* The decision in this case may turn on the existence of the contractual relation, and probably does. The company were entitled to assume proper care would be taken with the child when they issued the ticket. There does not seem any objection against an infant recovering against a wrongdoer, whose breach of duty is in conjunction with wrongdoing on the part of its nurse. The child could clearly maintain an action for negligence against the nurse, then why not against the other wrongdoer?

Chap. IV. passing tram and killed, while the infant is severely injured. The railway company are guilty of negligence. In attempting to cross as she did the woman is guilty of negligence, without which the accident would not have happened, and had she acted with ordinary prudence, neither she nor the infant would have suffered. The infant is in no respect negligent. The infant has no right of action against the railway company. (a)

PROPOSITION VIII

**Extraneous
perils.**

One engaged in work does not undertake the risk of any negligence in addition to the intrinsic and necessary perils of the work, and is not guilty of contributory negligence if he is injured through failure to make provision against perils extraneous and non-essential to his employment.

Illustrations.

"A labourer is not to be blamed or barred from recovering damages for injuries suffered by him through his employer's fault because he has not provided against a possible defect in his employer's machinery or tackle of which he could not be expected to be aware." (a)

"A workman is employed drilling holes in a rock. Overhead are men working at a crane lifting stones and of whose employment the workman is aware. At times stones are swung over his head without warning. One falls and injures him. He is not necessarily guilty of contributory negligence. (c)

A boy four years old goes with his sister to a house where a few steps protected on either side by railings lead to the door. One of the railings is broken. Ropes have been interlaced to protect the gap made, but are worn away. The sister goes into the house, telling the child to stop at

(a) *Waite v. N.E. Ry. Co.*, 13 B. & E. 719. The decision suggests the identity in principle between a helpless person in charge of another and a chattel injured while in charge of a person not the owner, by whose fault, in conjunction with that of another, injury is done to it. In *Ment v. G. E. Ry. Co.*, [1895] 9 Q. B. 387, the railway company were negligent, but not the barter.

(b) Per Lord Young, *Rooney v. Allans*, 10 R. 1224 at 1228.

(c) *Smith v. Baker*, [1891] A. C. 325.

the bottom of the steps. The child goes up the steps, falls through the gap and is injured. The owner of the house is not liable (a) Chap. IV.

PROPOSITION IX

The passenger on a vehicle is not identified with the servants in charge of the vehicle, so as to enable another person, whose servants have been guilty of negligence causing damage to the passenger, to defend himself by the allegation of contributory negligence on the part of the person injured. Identification.

A man gets out of an omnibus while the omnibus is in motion. The driver is negligent in not drawing up. Another omnibus coming up very fast behind, the man is unable to get out of the way and is killed. He is not identified with the negligence of the driver of the omnibus on which he was a passenger. The Illustrations.

(a) *Barthell v. Hickson*, 50 L. J. Q. B. 101. The ground of this decision is that the owner of the house never invited such a person as the plaintiff to come unless he was taken care of, and if he was in charge of others there was no concealed danger. If the child was brought, it was the negligence in leaving him which contributed to the accident. See possible limitations to this noted under Proposition VI, *ante*, 92, especially, *Jewson v. Gatti*, 2 T. L. R. 441. In an American case, *Schmidt v. Kansas City Distilling Co.*, 59 Am. R. 16, Henry, C. J., says an owner of property must not place temptations upon it to allure any one to a dangerous place upon his premises, nor yet place dangerous things so near a public street or highway as to endanger persons thereon, and the fact that young children are in the habit of resorting to the neighbourhood is an element in determining what is alluring and what safeguards should be adopted. If a child is in a place where it should not be permitted to be without being in the charge of some responsible elder, the negligence of the person, in whose custody the child should be, is imputed to the child so as to bar recovery. As regards children playing in the public streets, different considerations apply. "Very young children must go to school or run messages, and they are accustomed to play about the doors unattended, for the mass of people cannot afford to furnish them with a nurse. The presence of children on the public streets not old enough to be able to take care of themselves is one of the risks which the drivers of wheeled vehicles require to have in view." (Cuthrie Smith, *Law of Damages* (2nd ed.), 145, citing *Martin v. Wards*, 14 R. 811, and *Fraser v. Edinburgh Tramway Co.*, 10 R. 264. See also *Haughton v. North British Ry. Co.*, 20 R. 113, *ante*, 72.

(b) *Thorogood v. Bryan*, 8 C. B. 115, overruled by "*The Bernina*" *sub nom. Mills v. Armstrong*, 13 App. Cas. 1. *cf.* *Pike v. London General Omnibus Co.*, 8 T. L. R. 164.

B.E.L.

Chap. IV. Ships are in collision through fault common to the crews of both. Two people on board one ship to whom no participation in the negligence can be imputed, are injured. Their representatives can maintain an action against the owners of the other ship. (a)

PROPOSITION X

The *onus* of proving contributory negligence is on the defendant. In the absence of any such evidence the plaintiff is not bound to prove the negative in order to entitle him to a verdict. (b)

A man is found dead on a railway line. Nothing is known how he got there. To enable his widow to recover it is only necessary for her to show negligence of the company. If they rely on contributory negligence as a defence they must prove it. (c)

PROPOSITION XI

To justify the judge in leaving the case to the jury, notwithstanding the voluntary act of the injured person which contributes to the injury complained of, the circumstances must be such as either—

Firstly, make the question whether that act is negligent (either *per se*, or having regard to the conduct of the defendants inducing or affecting it), a question of fact; or,

(a) "The Bernina," *l.c.*

(b) See per Lord Watson in *Wakelin v. L. & S.-W. Ry. Co.*, 12 App. Cas. 11 at 43^c.

(c) *Wakelin v. L. & S.-W. Ry. Co.*, 12 App. Cas. 41. Another proposition illustrated by this case is, that where the plaintiff gives evidence of a state of things equally consistent with the wrong being caused by his own negligence, or by the negligence of the defendant, he has not proved his case. *Pointrel v. Lancs. & Y. Ry. Co.*, [1903] 2 K. B. 718; *Mitchell v. Glamorgan Coal Co.*, 23 T. L. R. 588; *Reynolds v. Tilling*, 20 T. L. R. 57; *Buttley v. Mayor, &c., of Drogheda*, [1907] 2 I. R. 134.

Secondly, render reasonable an inference of fact that the defendants, by using due care, could have obviated the consequences of the plaintiff's negligence. Chap. IV.

If the case is so clear that the determination of those two questions involves no inference of fact, it is for the judge and not the jury (a)

(a) *Per Pallen, C.B., Coyle v. G. N. Ry. Co. of Ireland*, 20 L. R. Ir. 409, 418, adopted in *the Commissioner of Railways v. Leahy*, 2 C. L. R. (Australia) 54.

CHAPTER V

LORD CAMPBELL'S ACT (a)

(9 & 10 Vict. c. 93, amended by 27 & 28 Vict. c. 95.)

PROPOSITION I

At common law an action for damages caused by the ^{common law} homicide of a human being cannot be maintained. _{doctrine.}

Actio personalis moritur cum persona. (b)

(a) The Legislature by the Short Titles Act, 1896 (59 & 60 Vict. c. 13), "An Act to facilitate the citation of sundry Acts of Parliament," has enacted that "without prejudice to any other mode of citation" this Act may be cited by the short title of the Fatal Accidents Act, 1846.

(b) Noy, Max. 14. For the history of this maxim, see Phillips v. Hornfray, 21 Ch. D. 149, per Bowen, L.J., at 151. The law in Scotland is not the same as that of England on this matter, see Wood v. Gray, [1892] A.C. 576. The rule is that whenever one person commits a wrong or tort against the property of another with the result of benefiting his own estate, the law will impose at the election of the injured party a contractual obligation on the wrongdoer to pay the injured party the value of the property appropriated. In the old pleading this was sued for in the form of *indebitatus assumpsit*. But this will not be for a merely destructive wrong. It is essential that there should be an enrichment of the wrongdoer's estate. The gist of the action is not the loss of the plaintiff but the gain of the defendant. *Lighly v. Clouston*, 1 Taunt. 112; *Cooper v. Cooper*, 117 Mass. 370. See Keener, *Quasi-Contracts*, 265, of which the inception was probably two articles on *Waiver of Tort, Hary, Law Rev.*, vi., 223, and 269. An action of tort is immediately superseded if one of the parties dies before verdict or other finding of the issues of fact, and there is no power by which the personal representatives can continue it, *Bowker v. Evans*, 25 Q. B. D. 585, *Flinn v. Perkins*, 32 L. J. Q. B. 10. There is an exception to this when a statute casts a duty on one person towards another, then the action for the breach of such statutory duty survives. *Peebles v. Oswaldtwistle Urban District Council*, [1896] 2 Q. B. 159. In re *O'Donovan v. Cameron, Swan & Co.*, [1901] 2 I.R. 683, is a decision of the Court of Appeal in Ireland which conflicts with this, which the Court of Appeal in *Darlington v. Rowcoo*, [1907] 1 K.B. 219, distinguished, and had it been necessary would probably have dissented from. See the last par. of *Cozens-Hardy, L.J.'s* judgment at 229. Whore money

Lord Campbell's Act

Chap. V.
Illustrations

"If a man beat the servant of J. S. so that he dies of that battery, the master shall not have an action against the other for the battery or the loss of service;" (a)

In an action to recover for loss of a wife's services, Lord Ellenborough, C. J., directed the jury "that the damages as to the plaintiff's wife must stop with the period of her existence;" (b)

The plaintiff's daughter is run over by a waggon and horses driven by defendant's servant and killed on the spot. No action is maintainable for the death (c)

The text of Lord Campbell's Act, 9 & 10 Vict. c. 93 is as follows:—(d)

An Act for Compensating the Families of Persons Killed by Accidents. [26th August, 1846]

WHEREAS no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him (e) Whenever the death of a person shall

An action to be maintainable against any Person causing Death through Neglect, &c. notwithstanding the death of the Person injured.

has been paid into Court without denial of liability and either of the parties dies, the Court has a discretion to order to whom the same should be paid out. *Maxwell v. Wolsley* (Viscount), [1907] 1 K B 274; R. S. C. 1853 Order XXII, rr. 1 and 2

(a) *Per Tanfield, J., Higgins v. Butcher*, 144 87, Noy 18

(b) *Baker v. Ballou*, 1 Camp 313. The whole of the authorities are noticed in "The Harrowing," 119 U. S. (12 Davis) 191

(c) *Osborn v. Gillett*, L. R. 8 Ex. 88, followed in *Clark v. London General Omnibus Co.*, [1906] 2 K B 648. See the argument of Sir John Campbell, A. C., in *Duncan v. Emilliter*, 6 Cl. & F. 804; *Salmond, Torts*, 834

(d) Only the unrepealed portion of Lord Campbell's Act and its amending Act are set out, see the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66), the Statute Law Revision Act, 1891 (54 & 55 Vict. c. 67), and the Statute Law Revision Act, 1893 (55 Vict. c. 14)

(e) See the use made by Pigott, B., of this preamble in *Osborn v. Gillett*, L. R. 8 Ex. 88 at 92; and by Kelly, C. B., at 100.

be caused by a wrongful act, neglect, or default, (a) and the act, neglect, or default is such as would (if death had not ensued) (b) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, (c) and although the death shall have been

Chap. V.

(a) No peculiarity arose under Lord Campbell's Act as to the nature of the act, neglect or default which will give rise to an action. The fact is that this is the same as at common law, where death has not followed the infliction of injury.

(b) See per Lord Blackburn, *Seward v. Vera Cruz*, 10 App. Cas. 89 at 70. *Davidson v. Hill*, 1901 2 K. B. 166, overruling *Adams v. British and Foreign Steamship Co., Ltd.*, 1895 2 Q. B. 436, decided that Lord Campbell's Act applies as well for the benefit of a foreigner, in respect of the death of a foreigner out of the jurisdiction, as for a British administrator of a British subject. *Cipriani v. Lawson* (1890, 10 Pang. N. C. 90), per Lindal, C. J., 95. "So long as it is the 19th of Henry VIII., I read in a case reported in Dyer, page 2, that an alien born in France having brought a writ of debt, and the defendant having demanded judgment if he was bound to answer, the plaintiff being out of the King's dominion, this Court held that the plea held no answer to the action." After citing *Trotter v. Morris*, 1 Phil. 131, where Acton, J., said "that an alien friend may well have here all action, pecuniary whatsoever," Tindal, C. J., thus concludes: "It would present our laws in a very unfavorable light to strangers if they were to be told that they can obtain no redress for an injury inflicted on them in this country, whereas if they come here but for an instant they are able to do so to those laws as to become liable for any wrong done by themselves." *The True*, [1900] 1 P. 1.

(c) "Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim, *actio personalis moritur cum persona*, because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of loss in the name of his executor. And not only so, but the action is not an action he could have brought if he had survived the accident, for that would have been an action for such injury as he had sustained during his lifetime, but death is essentially the cause of the action." per Lord Selbourne, C., *Seward v. Vera Cruz*, 10 App. Cas. 59 at 67. "Notwithstanding this, the survivors may be altogether deprived of their right of action by the conduct of the deceased, as, for instance, by his contributor's negligence." *Tucker v. Chaplin*, 2 C. C. R. 730, or by the deceased accepting a sum in full discharge. *Read v. E. Ry. Co.*, 1 K. B. 313 B. 555, or by the right of action of the injured person had he survived being barred by the Public Authorities Protection Act, 1893. *Williams v. Morse Docks and Harbour Board*, [1905] 1 K. B. 804. *Post*, 216. In *A-G v. Brunning* (1860), 8 If. L. C. 241 at 255, Lord Campbell, C., says: "It is then urged that probate is only to be

Chap. V. caused under such circumstances as amount in law to felony (a)

Action to be for the benefit of certain relations, and shall be brought by and in the name of executor or administrator of the deceased

11. Every such action shall be for the benefit of the wife, (b) husband, parent, (c) and child (d) of the person whose death shall have been so caused, (e) and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give (f) such damages as they may think

granted if that which is of definite value, that the executor could have put no definite value on his right to sue upon the contract, and that an executor might as well be called upon to include in his return of the estate and effects of the testator the value of his hope of recovering damages under a recent Act of Parliament, if the testator had come to his death by the negligence of a railway company. But this is only a removal of the objection that the only course for the executor to take was to sue for damages in respect of the breach of contract waiving his remedy by bill for specific performance, or by petition by which the exact amount of the pure loss-money might have been recovered. The sum to be recovered in case of death by negligence certainly would not be subject to probate duty, for it is not made part of the estate of the deceased, and, on the contrary, the Act of Parliament directs it to be apportioned among the members of the family of the deceased according to the pecuniary loss which they are supposed respectively to have suffered from the bereavement. *Per, 109*

(a) 1 p. Appleby v. Franklin, 15 Q. B. D. 93

(b) A wife living apart from her husband in adultery cannot recover under this provision. *Stimpson v. Wood*, 4 T. L. R. 589. 36 W. R. 731. [Query. Whether evidence of her husband's willingness to take her back would entitle her to maintain the action.]

(c) See s. 5. In *Stytle v. G. N. Ry. Co.*, 26 L. R. 11. 96, an application by the father and mother of the deceased for liberty to appear by counsel and solicitor at the trial of an action by the deceased's widow and executrix, and tender evidence as to the amount of their shares of the money to be awarded as damages in the action, or in default might be made parties thereto, was refused.

(d) See s. 5. A child en ventre sa mère was held to be entitled to be reckoned amongst those entitled to an apportionment of money recovered. "The George and Richard," L. R. 8 A. & E. 466, *Nurse v. Yeworth*, 8 Swan 608 (App.), *Villar v. Gilbey*, [1907] A. C. 119, *Williams v. Ocean Coal Co., Ltd.*, [1907], 2 K. B. 123. A husband cannot maintain the action. *Dickinson v. N.-E. Ry. Co.*, 2 H. & C. 735.

(e) It is not necessary to negative the existence of any relatives of the deceased other than those named in the writ; *Barney v. Ward*, 9 C. B. 392 at 398.

(f) In *The Franconia*, 2 P. D. 163, *Brannwell, L.J.*, observes at 171: "As to the words 'the jury may give,' that might possibly be held to mean jury where there was a jury, and Court where there was not. I do not say it could be, but whether or no, we are of opinion that under that section it must be a jury who find and direct the division into shares." "Would

proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, (a) and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct. (b)

Chap V.

an action be in the County Court without a jury? No, the jury is essential."

(a) Under Lord Campbell's Act there is no limit to the damages which may be recovered. Under the Employers' Liability Act, 1880, sec. 3, the amount of compensation recoverable is limited to "the estimated earnings during the three years preceding the injury of a person in the same grade employed during those years in the like employment." See *Neel v. Rotherham Foundry Co.*, [1906] 1 Q. B. 153, *post*, 239. Under the Workmen's Compensation Act, 1906, Sec. 4, "compensation" not exceeding in any case three hundred pounds, "if limited on three years' earnings, or, in the alternative of a sum of one hundred and fifty pounds may be given."

(b) The compensation awarded by the jury must be given in accordance with the legal principles embodied in Propositions D, III, IV, V, VI and VII. *Post*, 109-115. Funeral expenses cannot be taken into account. *Dutton v. S.E. Ry. Co.*, 41 C. B. (N.S.) 296, though, see per Bramwell, B., in *Osborn v. Bolton*, L. R. 8 Lx. 88 at 89. The reason that expenses of burial must be incurred some or later, and therefore cannot be recovered as damages, seems unsatisfactory as applied to Lord Campbell's Act. The Act compensates for the pecuniary loss caused by the death. In cases where a father has to bury a son whose death has been caused by accident, expenses appear to be imposed on the father which else in the order of nature would not be incurred by him at all, and *Mallimore, J.*, in *Bedwell v. Golding*, 18 T. L. R. 436, held that funeral expenses could be recovered under Lord Campbell's Act, and was followed by *Darling, J.*, *Clark v. London General Omnibus Co.*, 21 T. L. R. 505. But these learned judges in thus attempting to alter the law render themselves open to the same criticism as *James, J.*, made on *Blackburn, J.* who instead of following decided cases delivered a "very elaborate judgment," which "would appear to be rather an exposition of the law intended for the guidance of the House of Lords if and when the whole matter should ever come to be reviewed before that tribunal of ultimate appeal, because the thesis of the learned Judge is, not that the cases were wrongly decided, but that the cases were decided on a wrong principle. However, that is not the way a Court like this deals with the decisions of a Court of co-ordinate jurisdiction. The cases which are cited do not land us as *Blackburn*, because they are *inter alios alia* (sic), but they land us in so far as they are authoritative expositions and statements of the law. It is the principle of the decision by which we are bound, not a mere rule that in exactly the same circumstances we are to arrive at the same conclusions. Therefore, to say that the decisions are wrong in point of principle if that principle was clearly laid down, does not relieve us from the obligation of following the principle of the decision, because the whole theory of our system is, that the decision of a superior Court is binding on an inferior Court, and on a

Chap. V.

One only action shall lie, and to be commenced within twelve months.

III. Provided always that not more than one action shall lie for and in respect of the same subject-matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person. (a)

Plaintiff to deliver a full particular of the person for whom such damages shall be claimed.

IV. In every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his attorney, a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered. (b)

Construction of Act.

V. The following words and expressions are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject-matter; that is to say, words denoting the singular number are to be understood to apply also to a plurality of persons or things; and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender; and the word "person" shall apply to bodies politic and corporate;

Court of subordinate jurisdiction in so far as it is a statement of the law which the Court is bound to accept." *Morris v. Nicholls*, 7 Ch. D. 733 at 750. The Court of Appeal in *Clark v. London General Omnibus Co.*, [1906] 2 K. B. 648, however, overrule, *Phillimore and Darling, JJ. v. Cavan v. Crawshaw Brothers*, [1902] 1 K. B. 25. The Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), sec. 1, applies to an action under Lord Campbell's Act, and accordingly where applicable the action must be commenced within six months next after the act, neglect or default complained of. *Markey v. Tolworth Joint Hospital District Board*, [1900] 2 Q. B. 451.

(a) As to successive actions, where plaintiff's father and stepfather were simultaneously killed, see *Johnston v. Gt. N. Ry. of Ireland*, 26 L. R. 11. 691.

(b) See Annual Practice, under Order 19, r. 7, see also County Court Rules, 1903, Order 6, r. 1, and Order 44, r. 3. In Ireland, in *McCabe v. Guinness*, Ir. R. 9 (L. 510), default in delivering particulars with the declaration was held ground for setting aside the service of the writ, not for setting the writ aside.

and the word "parent" shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word "child" shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter.

Chap. V.

VI. Nothing therein contained shall apply to that part of the United Kingdom called Scotland (a)

Act not to apply to Scotland.

By an amending Act of 27 & 28 Vict. c. 95, the following additional provisions are made:—

1. If and so often as it shall happen at any time or times hereafter in any of the cases intended and provided for by the said Act that there shall be an executor or administrator of the person deceased, or that there being such executor or administrator no such action as in the said Act mentioned shall within six calendar months after the death of such deceased person or therein mentioned have been brought by and in the name of his or her executor or administrator, then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose

Where no action brought within six months by executor of person killed, then action may be brought by persons beneficially interested in result of action.

(a) By the law of Scotland a widow is entitled to damages for the death of her husband or son for the death of his father, and *vice versa*. It is no answer for the defender to show that the deceased was a burden to his family and his death a blessing. Evidence of this sort may affect the damages but will not traverse the right. *Elder v. Hogg* 11 Dunlop 1040. A claim of this sort is not competent to collateralists, whether the action is founded on *solatium* simply or on actual pecuniary loss. *Fried v. Dick*, 19 Dunlop, 297. *Easton v. North British Ry. Co.* 8 Macpherson, 280, *Black v. North British Ry. Co.*, 1908, S. C. 414. The Scotch law has been considered in the House of Lords, in *Chubb v. Chubb Coal Co.*, 1891, A. C. 412, and *Wood v. Gray & Sons*, 1902, A. C. 576. An illegitimate child may not sue in respect of the death of his mother. *Clement*, 1881, 1 P. 924; *Weir v. Coltness Iron Co.*, 16 R. 614. By the law of Scotland also a party whose interests were injured by a murder might maintain a civil action for damages, called an action of assythment, against the murderer. A verdict finding the prisoner guilty of the murder might be conclusive against him, but an acquittal was not conclusive in his favour as against the claim for damages. *McIlarg v. Campbell*, Mor. 12541, cited *Halston v. Rowat*, 1 Cl. & F. at 128, *cp.* appeal of murder.

Chap. V.

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benefit such action would have been, if it had been brought by and in the name of such executor or administrator; and every action so to be brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure, as nearly as may be, as if it were brought by and in the name of such executor or administrator. (a)

Money paid into Court may be paid in one sum without regard to its division into shares

(if not accepted, defendant entitled to verdict on the issue)

2. It shall be sufficient, if the defendant is advised to pay money into Court, that he pays it as a compensation in one sum to all persons entitled under the said Act for his wrongful act, neglect or default, without specifying the shares into which it is to be divided by the jury; (b) and if the said sum be not accepted, and an issue is taken by the plaintiff as to its sufficiency, and the jury shall think the same sufficient, the defendant shall be entitled to the verdict upon that issue.

This and revised Act to be read as one.

3. This Act and the said Act shall be read together as one Act.

(a) Under the similar Canadian Act an action for damages by reason of the death of a person can be maintained by the person beneficially entitled, though brought within six calendar months from the death, unless there be at the time an executor or administrator of the deceased. *Lampman v. Cambridge*, 17 Ont. R. 191, following *Holliman v. Bagnell* 1 L. R. 1171.

(b) Where money has been paid in compromise a claim, but no division or apportionment of the money has been made, and there is no legal right to obtain apportionment, an action will lie, though the proper remedy is to go to a court of equity to compel the defaulter to administer the trust. *Condill v. Condill*, 29 L. T. (N. S.) 831. Money paid into Court may be paid out on a consent embodying the agreed terms of payment being made a rule of Court, *Shallow v. Vardon*, 11 R. 9 C. L. 150. Failing an agreement, money paid into Court may be paid out in proportions fixed by analogy to the Statute of Distributions. *Sanderson v. Sanderson*, 36 L. T. (N. S.) 847. As to money paid into Court on account of an infant, 11 S. C. 1983, Order 22, 11 15 and 16, and C. C. R. 1903, Order 18, r. 24. For the practice as to next friend of an infant, see Annual Practice, 1904, 171. In Scotland it has been held that as the next friend is *dominus litis* he may compromise the infant's claim. *Gow v. Henry*, 2 F. 18. It seems that in Scotland a mere claim for personal injury may be assigned. *Wail v. Actieselskabet Dalhætte*, 6 F. 798. This is not so in England. *Prosser v. Edmonds*, 1 X. & C. 481. The law as to the assignment of rights of action for torts is exhaustively treated in eleven propositions in *Salmond, Law of Torts*, 183.

PROPOSITION II

Compensation under this Act is to be governed by the consideration of what the deceased man himself would be entitled to were he alive and suing.

Compensation limited by loss.

"You cannot estimate the value of a person's life to his relatives. . . . Illustration. You must estimate the damage by the same principle as if only a wound had been inflicted."

PROPOSITION III

Compensation under this Act is purely for pecuniary loss, therefore mental sufferings of the surviving relatives cannot be taken into consideration.

Loss means pecuniary loss.

"The meaning of this enactment is this: If a man's life be valuable to his family by reason of his possession of any annuity, his family have now a right to say, 'We have lost the life on which this annuity hung,' and they may claim compensation for that loss, but nothing more; they cannot enter into the question of the shock to their feelings." (b)

PROPOSITION IV

Pecuniary loss from a death is estimated by reference to any reasonable expectation of pecuniary benefit the

Pecuniary loss measured by prospect of pecuniary benefit.

(a) Per *Parker v. Amesworth & N. E. Ry. Co.* (1897), 11 Jan. 758 at 760. The meaning of this is that the claim of the relatives is limited to the loss they have sustained by the death.

(b) Per *Pollock, C. B.*, *Gillard v. Lancashire & N. Ry. Co.* (1848), 12 L. T. (O. S.) 356, qualified by his remark in *Pym v. N. Ry. Co.*, 4 B. & S. 396 at 402, *Blake v. Midland Ry. Co.* (1852), 18 Q. B. 93. In *St. Lawrence and Ottawa Rd. Co. v. Lett*, 11 Can. S. C. R. 422, a husband is held entitled to recover in respect of the death of his wife damages for the loss of household services accustomed to be performed by the wife, which have to be replaced by hired services, and also the loss to the children of the care and moral training of their mother.

Chap. V. survivors may establish, and is not limited to the consideration of the actual legal liability of the deceased to support them.

Illustrations

"What," says, Fitzgibbon, L.J., "is the 'pecuniary damage' of which the plaintiff must give evidence? In my opinion damage capable of being estimated in money and of being compensated in money." *a*

A father who is old and infirm received assistance from his son to the extent of 3s 6d per week. The son is killed by the negligence of a railway company. The reasonable expectation of the father that the son would continue his assistance is sufficient to enable the father to maintain an action. *(b)*

A chemist, by mistake for medicine of rhubarb, sends laudanum for a child, and which, being administered, causes death. The child is only twelve years old, living at home, and pecuniarily a burden to its parents. The father has a reasonable expectation of benefit from the child, and can sue. *(c)*

A father sues in respect of the death of his son, caused by the defendant's negligence. Two years and a half before the accident the boy earned 1s a week. At the time he was killed he was not in any employment. The father on the finding of the jury is entitled to recover *id.*

(a) Wolfe v. G. N. Ry. Co., 26 L. R. Ir. 536.

(b) Franklin v. S. E. Ry. Co. (1858), 3 H. & N. 211, followed in Dalton v. S. E. Ry. Co. (1859), 4 C. B. (N. S.) 296. But where a father employed his son, who was a skilled workman, at the current rate of wages, he was held to have no claim under the Act in respect of his loss. Rykes v. N. E. Ry. Co., 44 L. J. C. P. 191, and where the father was in an independent position, and the child had never contributed anything to the father, and there was no moral duty upon the child's part, taking into consideration the position of the father, to contribute any part of earnings he might make in the future, it was held that no reasonable expectation existed sufficient to warrant the claim being left to a jury. Bonke v. Cork and Macroom Ry. Co. (1870), 4 L. R. Ir. 652, Johnson v. G. N. Ry. Co. of Ireland, 26 L. R. Ir. 603.

(c) Bramall v. Lees, 29 L. T. (O. S.) 111 and 166, where the rule obtained in the case is stated to have been abandoned.

(d) Duckworth v. Johnson (1853), 4 H. & N. 653, Bramwell, B., doubted. The test applied was whether there was "some evidence of a prospect of benefit." Morris, C.J., in Ifolleran v. Bagnell, 6 L. R. Ir. 333, adds a rider to the principle as enunciated in Duckworth v. Johnson: "And there should be distinct evidence of pecuniary advantage in existence prior to or at the time of the death. This advantage must be a benefit to the plaintiff." The same rule was adopted in Hull v. G. N. Ry. Co. of Ireland, 26 L. R. Ir. 289; and in Wolfe v. G. N. Ry. Co. of Ireland, 26 L. R. Ir. 518.

A widow sues in respect of the death of her son, a boy of fourteen, who had never earned wages, but whose capability is valued at sixpence a day. The probability of his earning more and devoting part of his earnings to his mother is evidence that must be submitted to a jury. (a)

A man of considerable landed property, which went in greatest part to his eldest son, but who had several younger children, is killed by the negligence of a railway company. His property is undiminished, but the distribution of it is altered by his death. Those of his family who have lost a reasonable probability of pecuniary benefit by the death can maintain an action. (b)

A landlady sues in respect of the death of her mother, killed in a railway accident. The mother lived with her daughter (the plaintiff), by whom she was lodged and maintained. The mother assisted in the laundry, in keeping house, and cooking and serving meals. No evidence is given that the value of her services exceeded the cost of her support. Failing evidence on this point there is no case to go to the jury. (c)

A child of ten, negligently killed on the defendants' railway line, "did the work of the house" for her father and mother. There is evidence that after her death the parents are obliged to hire a substitute at 3s. 6d. a week. This is evidence that must go to a jury of reasonable expectation of pecuniary benefit. (d)

Judge Lush, J., held in the City of London Court (*Times* Newspaper, 13th February, 1903) that where two children, thirteen and sixteen years of age respectively, were supported by a grandfather aged seventy, and the father did not contribute anything, on the death of the father through an accident there was no reasonable expectation of pecuniary benefit from him such as would enable them to recover under the Employers' Liability Act, 1880. "The facts and circumstances of the particular case, here of the habits, health, means, declarations, and disposition of the father, must have a deciding force in cases of this kind." As Field, J., said in *Heatherington v. N. & W. Ry. Co.*, 9 Q. B. 1160 at 1162: "I have always understood the rule laid down by the decisions in such cases to be that there must have been a reasonable expectation of pecuniary advantage to the relation from the life of the deceased." There five or six years before the accident a father being out of work for six months had been assisted by his son, who had not done so since.

(a) *Condon v. Great Southern and Western Ry. Co. of Ireland*, 16 Ir. C. L. 415. In this case past fatal conduct was also held evidence to be submitted to the jury.

(b) *Pym v. G. N. Ry. Co.* (1892), 2 B. & S. 759, 4 B. & S. 396. The remedy, it was said, was given not to a class but to individuals.

(c) *Hull v. G. N. Ry. Co. of Ireland*, 26 L. R. Ir. 289.

(d) *Wolfe v. G. N. Ry. Co. of Ireland*, 26 L. R. Ir. 548. In the opinion of Fitzgibbon, L. J., in this case, at 560, "pecuniary damage" must be damage capable of being estimated in money and compensated in money.

Chap. V.

A father, fifty-nine years of age and infirm, sues in respect of the death of his son. Five or six years previously, while the father had been out of health, the son had contributed to his support. At the time of the son's death by the defendant's negligence these contributions had ceased. There is evidence of a reasonable expectation of pecuniary benefit. (a)

PROPOSITION V**Life income.**

Where the person in respect of whose death an action under this Act is brought was in possession of an income terminating with his life, the jury, in assessing the loss arising from the death, should be directed to calculate the value of the income as a life annuity, and then to deduct therefrom such allowances in respect of the various contingencies attaching to the life, and the income while enjoyed by the deceased, save only the accident causing the death, as, in the circumstances of the case, seem reasonable and probable. The remainder is the pecuniary loss recoverable under the Act.

Illustrations.

A widow sues in respect of the death of her husband. The deceased was a partner in a mercantile house. His whole income was £850 a year, derived from profits of trade as well as from permanent sources. His age at the time of his death is thirty-four, his wife's age twenty-six.

The judge suggests to the jury, as a mode of estimating the pecuniary loss, to take so much per annum of the whole income as a wife living with her husband, and maintained according to her station in life, might be supposed to enjoy, and considering it as an annuity to reckon its value as so many years' purchase as it was worth, reference being had to the joint ages of husband and wife, then to deduct from this gross value the amount in money which the wife would become entitled to by the death

The question in what circumstances services are to be considered as rendered gratuitously or for remuneration was considered in *Thomson v. Thomson's Trustee*, 16 R. 833, per Lord Shand at 335. "Reasonable expectation of benefit" is discussed, *Mason v. Bertram*, 18 Ont. R. 1.

(a) *Hetherington v. N.-E. Ry. Co.* (1882), 9 Q. B. D. 100.

of her husband (namely, his share of the partnership profits for a term of from four to five years, according to the deed of partnership, and dower upon his real property), and to award the balance as compensation under the Statute

Chap. V.

It is objected that allowance is not made for certain contingencies which might have lessened the annual amount supposed to be enjoyed by the wife during the husband's lifetime. The learned judge admits these. A new trial is, however, granted on the ground that the judge at the trial had not more specifically mentioned any claim for mental suffering, or

A son-in-law, by articles of partnership with his father, covenants during the joint lives of himself and his mother to pay her an annuity of £200. He is killed in a railway accident. At the time of his death he is forty years of age, and his mother sixty-one. He leaves a widow and children. His executrix brings an action under Lord Campbell's Act. The judge directs the jury that they may if they think proper, calculate the damage which the mother of the deceased is entitled to recover by ascertaining what is the sum of money which would purchase an annuity for a person sixty-one years of age according to the average duration of human life, and that they may if they think proper, take as a guide in their calculations of the damages recoverable for the wife and children the probable duration of the life of a man of forty years of age, in the circumstances in which the deceased was. Tables used by insurance offices, and known as the "Cathole Tables," are put in to show the average duration of lives of the ages indicated.

The direction of the learned judge is accepted to and held defective—(1) in not pointing out that the mother had lost an annuity for the *joint* lives of herself and her son, (2) in not pointing out that the annuity lost was one secured by the personal covenant of the deceased, while that spoken to in the evidence was a Government annuity, or one on very exceptionally good security.

The direction is, however, correct—(1) in taking the annuity as an average one in the absence of evidence that the life was either better or worse than the average, (2) in stating that the data from actuaries' tables may be elements for the consideration of the jury (b)

(a) *Blake v. Midland Ry. Co.*, 18 Q. B. 93

(b) *Rowley v. L. & N.W. Ry. Co.*, [1873] 11 R. 8 Ex 221, followed *Johnston v. G.W. Ry. Co.*, [1904] 2 K. B. 250, where (at 253) Williams, L.J., approves a direction: "There are the accidents of life and other elements which have to be taken into consideration, which ought to prevent you giving him such a sum as would be simply an investment for

B.E.L.

Chap. V.

PROPOSITION VI

Insurance
money taken
into account

At common law insurance money receivable by the injured party is not to be taken into account in estimating the compensation payable in case of accident.

The rule under Lord Campbell's Act was different, and the reasonable expectation of pecuniary benefit from insurance money receivable by the executor or administrator of the deceased was taken into account.

Now the rule under Lord Campbell's Act is identical with that of the common law (a)

Illustrations

A plaintiff recovers £217 at common law in respect of damages sustained through the defendants' negligence. He had received besides £31 on account of the accident upon an insurance effected by him with an insurance company. This latter sum cannot be taken into account in reduction of damages (c)

A man was killed by the negligence of a railway company. His representative sued under Lord Campbell's Act. Two insurance policies were subsisting, into which he had entered—one against accident by railway, one on his life. The whole amount of the one was to be deducted from the money payable to his representative; from the other only the amount of the premium payable for the period for which the jury estimated his life (c)

A healthy man forty-one years of age loses his life through the negligence of a railway company. He leaves no estate but has effected a life policy for 2,000 dol., payable to his widow. This is paid to her after his decease. She sues under the Canadian Statute corresponding to Lord Campbell's Act. The defendants claim to deduct the 2,000 dol. from the amount assessable as damages. The Court holds that the sum is not to be deducted. Still, he is entitled to a fair sum, considering the position for which he was fitted and the position in which he is now." See also *Phillips v. L. & S. W. Ry. Co.*, 5 Q. B. D. 78, and 5 C. P. D. 280, *ex Vicksburg Rd. Co. v. Putnam*, 118 U. S. (11 Davis) 545 at 554, and *Central Vermont Rd. Co. v. Franchère*, 35 Can. S. C. R. 68. As to the actuarial value of an annuity, see per Lord Eldon, *C. v. Lowe v. Barnard*, 8 Ves. 183 at 186. As to the general principles of compensation, *post*, 290.

(a) Fatal Accidents (Damages) Act, 1908 (8 Edw. 7. c. 7).

(b) *Bradburn v. G. W. Ry. Co.*, L. R. 10 Ex. 1.

(c) *Hicks v. Newport, Abergaveuny and Hereford Ry. Co.*, 4 B. & S. 403 n.

receipt of the insurance money by the widow is merely one of the circumstances which ought to be taken into account by the jury in estimating her pecuniary loss, and the jury are not bound as matter of law, to deduct from the damages the full amount paid to the widow under the policy. (u)

Chap. V.

PROPOSITION VII

The pecuniary loss in respect of which the representatives of the deceased are compensated under Lord Campbell's Act does not include the right to recover for any injury sustained through the death by the personal estate.

Pecuniary loss under the Act does not include injury to the personal estate

A widow, after recovering damages for the death of her husband under Lord Campbell's Act, sued as administratrix of her husband to recover damages for injuries caused by the same negligence to the "personal chattels" of the deceased. She is entitled to do so. (v)

The widow of a man killed in a railway accident brings an action for damages against the railway company, not contentedly upon her husband's death, but caused by his inability to attend to his business in his lifetime. She is entitled to recover. (v)

(u) *Grand Trunk Ry. Co. of Canada v. Jennings*, 13 App. Cas. 800. At the trial the judge, apparently wrongly, excluded from the consideration of the jury "all chances of the deceased's having obtained a rise of wages, or of his having been able to make some better provision for his widow", see at 805.

(v) *Barnet v. Lucas* (1800) 10 R. 511; L. 110, in *Ex Ch. v. R. v. C.* L. 247, cp. *Bunsen v. Humphrey* (1844), 11 Q. B. D. 141. A claimant recovered damages for injury caused by the defendant's negligence to his cab. He subsequently recovered for personal injuries sustained through the same negligence. His claims were at common law. This case is almost identical with *Roberts v. Eastern Counties Ry. Co.*, 11 L. & T. 160.

(c) *Bradshaw v. Lanes & Y. Ry. Co.* (1875) 1, R. 101; P. 189, following *Potter v. Metropolitan District Ry. Co.*, 30 L. T. (N. S.) 767, and followed by *Leggett v. G. N. Ry. Co.*, 11 Q. B. D. 399; *Phillips v. G. E. Ry. Co.*, 9 Q. B. D. 104, which was an action by an administratrix for loss of earnings by her intestate during his illness preceding death, and for medical expenses, was distinguished from *Bradshaw's* case on the ground that the alleged cause of action arose from a tort having no foundation in contract. See *London v. London Road-Car Co.*, 4 T. L. R. 448, also *Hatchard v. Mege*, 18 Q. B. D. 771. There is a Canadian case, *White v. Parker*, 16 Can. S. C. R. 639, which may be looked at.

Chap. V.

PROPOSITION VIII

Receipt not
conclusive of
satisfaction.

The acceptance of compensation and the giving a receipt by the plaintiff in full satisfaction and discharge of his cause of action is *prima facie* a bar to any further claim but such receipt is not conclusive; (a) and, where it is shown that the compensation was accepted and the receipt given in ignorance of the plaintiff's total injuries and claim, or that any unfair advantage was taken of the plaintiff in order to obtain it, will not avail to defeat the plaintiff's claim.

Illustrations.

Deceased had recovered damages in an action in respect of the injuries which subsequently caused his death. On death causing deceased's executor seeks to bring a fresh action. He is not entitled to do so. (b)

A railway company gave a man injured by them £20, for which he signed a receipt in full satisfaction of the grievance complained of. The man seeks to bring an action, alleging the facts in respect of which he had been given the £20 and had signed the receipt. He declares he did not read the receipt, but supposed it merely acknowledged the payment of the £20. There is a question for the jury whether the plaintiff's mind went with his signature and was he aware of the terms of the receipt. (c)

Plaintiff effected a policy of insurance with defendants against bodily injury. He meets with an injury which disables him for some days. He

(a) A question has been raised whether there is any legal difference between "a receipt in full discharge" and "a formal agreement to satisfaction." The difference would appear for practical purposes to be only in degree. The one document is a contract and the other is not. In both cases the plaintiff would have to establish a case for relief. In the case of the contract he would have to overcome a stronger presumption against him, possibly even to show fraud. *Steward v. G. W. Ry. Co.*, 2 H. & L. 821, 319. *Croft v. Caledon Shipbuilding and Engineering Co.*, [1906] W. N. [H. L.] 104. In the case of a contract with an infant, *Stephens v. Dordridge Ironworks Co.*, [1904] 2 K. B. 225 at 229, points out that "whenever such a contract comes before a court of law, the question whether it was for the benefit of the infant has to be considered, and the contract will not be enforced unless the Court is of opinion that it was for the benefit of the infant."

(b) *Read v. G. E. Ry. Co.*, L. R. 3 Q. B. 555, see *Farmer v. Grand Trunk Ry. Co.*, 21 Ont. R. 399.

(c) *Ridcal v. G. W. R. Co.*, 1 F. & F. 700.

then signs an agreement undertaking to accept £11 15s. 10d. in full discharge of his claim against defendants in respect of the accident. Subsequently he signs a receipt for the money in full discharge of his claim. After this and in consequence of the injury he becomes totally disabled for twenty-six weeks. He then brings his action to recover the sum of £114 12s., the balance of the sum due under the policy for a such total disablement. He is entitled to succeed, for his agreement is to accept the sum he receives in full discharge of his claim against defendants in respect of the accident. That meant the claim which had already been made, and which related solely to the disablement to which he had already suffered. (a)

When a man is living suffering from the effects of an accident, persons go to him on behalf of the railway company liable for the consequences of the accident and induce him, by false representations as to the medical opinions which have been given about his case, to accept an insignificant sum in full of all demands. The railway company will be restrained from setting up the document thus procured against a further claim. (b)

A gentleman of education and skill having received injury in a railway accident, and having been treated for some time for his injuries and seen by doctors on behalf of the railway company, sends to the company, after consultation with his medical advisers, a claim for £634. Persons from the company having visited him on the subject of this claim, and having discussed it, the compensation is fixed at £100. The money is paid and a receipt given by the injured man to the Lancashire and Yorkshire Railway Company "in discharge of my claim in full upon that company for all loss sustained and expenses incurred by the late accident," "including all expenses attending the same." Subsequently, on the ground that the injuries are more serious and permanent than had been supposed, an action is commenced against the company for damages. The company in defence alleges the payment of the £100 in satisfaction. The Court of Chancery refuses to restrain the company from relying on their plea. In the action it is for the jury to say whether the plaintiff, *bona fide* and fairly knowing what he was about, received the sum in satisfaction of his claims. (c)

(a) *Prosser v. Lancashire and Yorkshire Accident Insurance Co.*, 6 T. L. R. 285, per Lord Esher, M. R., at 286. As the injury had been discharged and the case heard by the judge, this conclusion must be taken to be his on the evidence acting as a jury.

(b) *Stewart v. G. W. Ry. Co.*, 2 D. G. J. & S. 319, *Crossan v. Caledon Shipbuilding and Engineering Co.*, [1906] W. N. (H. L.) 104.

(c) *Lee v. Lancs. & Y. Ry. Co.* (1870), L. R. 6 Ch. 527; see particularly per Mellish, L. J., at 536, *McDonough v. MacCellan*, 13 R. 1000. *Wright v.*

Chap. V. A plaintiff having taken £27 in settlement is held barred from pursuing an action for £5,000 (a)

An apprentice who receives 5s a week as wages is injured, losing three fingers while working a plane driven by machinery and insufficiently fenced. A relative with whom he is living but who is not his guardian writes to the employers and says that he cannot "do less than respectfully make a claim upon the Company (under the Workmen's Compensation Act, 1897) for the sum of £50 as compensation for the loss of such fingers." The employers answer that they are willing to pay the scale of compensation under that Act. On the following day the apprentice gives a receipt "Received of the Dudbridge Ironworks Co., Ltd., the sum of 12s 6d., being the first five of the successive weekly payments which I elect to accept under the Workmen's Compensation Act in full satisfaction and discharge of all claims for compensation accrued or to accrue, in respect of all injuries or injurious results, direct or indirect arising or to arise from an accident sustained by me on or about the 15th day of August last while in the employment of the above" (b). The receipt is not binding on the infant, and though he has returned and worked some time in the employment he has not lost his right of action at common law (c).

PROPOSITION IX

Admiralty
Division no
jurisdiction
against wrong-
doing vessel
under the Act

The Admiralty Division of the High Court of Justice has no jurisdiction to entertain suits instituted under Lord Campbell's Act by the legal representatives of the deceased person against the wrong-doing vessel.

London General Omnibus Co. (1877), 46 L. J. Q. B. 421, is a case of *res judicata*, and not of accord and satisfaction. The question of knowledge or intention could therefore not arise. *Hirschfeld v. London, Brighton and South Coast Ry. Co.*, 2 Q. B. D. 1, is the case of fraudulent representation as to the nature of injuries.

(a) *North British Ry. Co. v. Wood*, 18 R. (H. L.) 27, followed in *Maackie v. Strachan, Kinnon & Co.*, 23 R. 1030, and *Ellen v. G. N. R. Co.*, 17 T. L. R. 443.

(b) *Neale v. Electric and Ordnance Accessories Co., Ltd.*, [1906] 2 K. B. 558, differs in being the case of the award of a judge on the trial of an action.

(c) *Stephens v. Dudbridge Ironworks Co.*, [1904] 2 K. B. 225. *Valenti v. Wm. Dixon*, [1907] S. C. 695, is a case under the Workmen's Compensation Act, 1897, where it is held not proved that the applicant had elected to take compensation under the Act.

The action under Lord Campbell's Act is "as plainly as possible, a personal action given for a personal injury inflicted by a person who would have been liable to an action for damages, manifestly in the common law courts, if the death had not ensued" (1).

Chap. V.

Illustration.

(a) Per Lord Selborne, C., in *Seward v. "Vera Cruz,"* 10 App. Cas. 59 at 67. The question principally in dispute was whether the Admiralty Court Act, 1861 (24 Vict. c. 10), gave the jurisdiction by the words of sec. 7, which enacted that the "High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." The answer, after much fluctuation of opinion, is that it did not. In *Seward v. "Vera Cruz,"* at 64, Lord Selborne, C., affirms the jurisdiction of the Admiralty Division to deal with an action under Lord Campbell's Act, "as in any other case (but not more in this than any other case), if no objection were taken, and no transfer asked for or made." This, however, is not to constitute an Admiralty action under the special Admiralty jurisdiction, see *The Orwell*, 13 L. R. 80. See the Canadian case, *Monaghan v. Henn*, 1 Can. S. C. R. 409, and the United States case "*The Corsair*," 115 U. S. (33 Dec. 1885) 315 at 311, where the English case are collected and considered.

PART II

THE EMPLOYERS LIABILITY ACT, 1880

THE EMPLOYERS LIABILITY ACT, 1880 (a)

(13 & 14 Vict. c. 12)

An Act to extend and regulate the Liability of Employers
to make Compensation for Personal Injuries suffered
by Workmen in their service. (b)

A.D. 1880.

[7th September 1880]

Enacted by the Queen's most Excellent Majesty, by

(a) "As to the style or title of the Act," says Lord Coke (11 Co. Rep. 33), "that is no part of the Act, and ancient Statutes were without any title, and many Acts are of greater extent than the titles are." Lord Haldwicke also, in *Att.-Gen. v. Lord Weymouth* (Ambler 23), says, "The title is no part of the Act." Title, preamble, and marginal notes.

"In strictness neither the full title, the marginal notes nor the punctuation form any part of an Act of Parliament, and they ought not in any way to be allowed to affect its construction" (Per Willes, J., in *Claydon v. Green*, L. R. 10 C. P. 511 at 522). Although the full title is no part of an Act of Parliament it is always on the roll. As to the marginal notes, the practice is uncertain (*Sutton v. Sutton*, 22 Ch. D. 511, per Jessel, M.R., at 512). The title and the preamble only always "be looked at in order to remove any ambiguity in the words of the Act" (Per Huddleston, B., in *Coombes v. Justices of Bucks*, 9 Q. B. D. 17 at 19). The significance of a statement in the preamble of an Act of Parliament was discussed at length in *Powell v. Kempton Park Racecourse Company* in the House of Lords, [1899] A.C. 143 at 157, 184 and 199, and by Lord Macnaghten in *Fenton v. Thorley & Co.*, [1903] A.C. at 447.

"In old days," says Lindley, M.R. (*Fielding v. Morley Corporation*, [1890] 1 Ch. 1 at 4), the title of an act of Parliament used not to be part of the Act, "and in the old law books we were told not so to regard it, but now the title is an important part of the Act and is so treated in both Houses of Parliament." In *Eagleson, Liability of Employers*, the various dicta of judges on the necessity for a beneficial construction of the Act in the interest of the workman are collected at 85-90.

(b) *Post*, 184.

1 D 1880.

and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Amendment
of law.

1. Where after the commencement of this Act personal injury (*a*) is caused (*b*) to a workman (*c*)

(1) By reason of any defect (*d*) in the condition (*e*) of the ways, (*f*) works, (*g*) machinery, (*h*) or plant (*i*) connected with or used in the business of the employer, (*k*) or

(2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him (*l*) whilst in the exercise of such superintendence; (*m*) or

(3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, (*n*) and did conform, where such injury resulted (*o*) from his having so conformed; (*p*) or

(4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or byelaws of the employer, (*q*) or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; (*r*) or

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|------------------------|-----------------------------|-----------------------------|-----------------------------|
| (a) <i>Ante</i> , 51. | (b) <i>Ante</i> , 52. | (c) <i>Post</i> , 265. | (d) <i>Post</i> , 159, 187. |
| (e) <i>Post</i> , 156. | (f) <i>Post</i> , 168. | (g) <i>Post</i> , 168, 173. | (h) <i>Post</i> , 169, 175. |
| (i) <i>Post</i> , 181. | (k) <i>Post</i> , 168, 179. | (l) <i>Post</i> , 191, 197. | (m) <i>Post</i> , 194. |
| (n) <i>Post</i> , 208. | (o) <i>Post</i> , 223. | (p) <i>Post</i> , 221. | (q) <i>Post</i> , 224. |
| | | (r) <i>Post</i> , 229. | |

- (5) By reason of the negligence of any person in the service of the employer who has the charge or control *(a)* of any signal, points, locomotive engine, or train upon a railway, *(b)*

the workman, or in case the injury results in death, the legal personal representatives of the workman, *(c)* and any persons entitled in case of death, shall have the same right of compensation *(d)* and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

2 A workman shall not be entitled under this act to any right of compensation or remedy against the employer in any of the following cases, that is to say, exceptions to amendment of law

- (1) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, *(e)* or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition, *(f)*
- (2) Under sub-section four of section one, unless the injury resulted from some impropriety or defect in the rules, byelaws, or instructions therein mentioned; provided that where a rule or byelaw has been approved or has been accepted as a proper rule or byelaw by one of Her Majesty's Principal Secretaries of State, or by the Board

(a) Post, 237
(d) Post, 290

(b) Post, 234
(e) Post, 169.

(c) Post, 238, 289.
(f) Post, 137.

A.D. 1880

of Trade or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or byelaw. (a)

- (3) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, (b) unless he was aware that the employer or such superior already knew of the said defect or negligence. (c)

Limit of sum recoverable as compensation.

3. The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, (d) of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury. (e)

Limit of time for recovery of compensation.

4. An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death. (f) Provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice. (g)

(a) Post, 224.

(b) Post, 191.

(c) Post, 153, 191, 191.

(d) Post, 154.

(e) Post, 210

(f) Post, 212.

(g) Post, 213

5. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under, or through a workman in respect of any cause of action arising under this Act, any penalty or part of a penalty which may have been paid in pursuance of any other Act of Parliament to such workman, representatives, or persons in respect of the same cause of action; and where an action has been brought under this Act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this Act, and payment has not previously been made of any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action, such workman, representatives, or person shall not be entitled thereafter to receive any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action. (a)

A.D. 1890
Money payable
under penalty to
be deducted from
compensation
under Act

6 —(1) Every action for recovery of compensation under this Act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may by law be removed. (b)

Trial of actions.

(2) Upon the trial of any such action in a county court before the judge without a jury one or more assessors may be appointed for the purpose of ascertaining the amount of compensation. (c)

(3) For the purpose of regulating the conditions and mode of appointment and remuneration of such assessors, and all matters of procedure relating to their duties, and

(a) *Post*, 248.

(b) *Post*, 251.

(c) *Post*, 258.

A.D. 1880

also for the purpose of consolidating any actions under this Act in a county court, and otherwise preventing multiplicity of such actions, rules and regulations may be made, varied, and repealed from time to time in the same manner as rules and regulations for regulating the practice and procedure in other actions in county courts. (a)

"County court" shall, with respect to Scotland, mean the "Sheriff's Court," and shall, with respect to Ireland, mean the "Civil Bill Court." (b)

In Scotland any action under this Act may be removed to the Court of Session at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, section nine of the Sheriff Courts (Scotland) Act, 1877. (c)

10 & 41 Vict.
c. 60.

In Scotland the sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries. (d)

Mode of serving
notice of injury

7. Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers. (e)

The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served. (f)

The notice may also be served by post (g) by a registered letter addressed to the person on whom it is

(a) *Post*, 259.(d) *Post*, 254.(b) *Post*, 258.(e) *Post*, 259, 262.(g) *Post*, 262.(c) *Post*, 258.(f) *Post*, 265.

to be served at his last known place of residence or place of business; and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and, in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.

A.D. 1880.

Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or, if there be more than one office, any one of the offices of such body.*(a)*

A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading *(b)*

8. For the purposes of this Act, unless the context *conditions* otherwise requires,—

The expression "person who has superintendence entrusted to him" means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour: *(c)*

The expression "employer" includes a body of persons corporate or unincorporate: *(d)*

The expression "workman" means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies: *(e)*

(a) Post, 260.

(b) Post, 2.

(c) Post, 197.

(d) Post, 265.

(e) Post, 266.

A.D. 1880
Commencement
of Act.

9. This Act shall not come into operation until the first day of January one thousand eight hundred and eighty-one, which date is in this Act referred to as the commencement of this Act. (a)

Short title

10. This Act may be cited as the Employers Liability Act, 1880, and shall continue in force till the thirty-first day of December one thousand eight hundred and eighty-seven, and to the end of the then next Session of Parliament, and no longer, unless Parliament shall otherwise determine, and all actions commenced under this Act before that period shall be continued as if the said Act had not expired (b)

(a) This section is repealed by the Statute Law Revision Act, 1891 (54 & 55 Vict. c. 56), First Schedule

(b) *Ibid.*, 205

CHAPTER VI

THE EMPLOYERS LIABILITY ACT, 1880

THE relation of master and servant at common law, as developed in the preceding chapters, may be stated in the following proposition: A master is not liable to any servant for any injury which arises from the act or default of any fellow servant, whether that fellow servant be in a position of authority or not; and, in ascertaining whether the person to whose act or default the injury is due is a fellow servant, the widest possible construction is given to the term "common employment" (a) To this there are certain exceptions. The servant is saved from the operation of the general rule, and held to have his action, if he shows either:

First, that the master has omitted to provide suitable materials and facilities for the work; or

Secondly, that the master has been in default in engaging incompetent workmen through whose incompetence the injury happens; or,

Thirdly, that the master has personally been guilty of the negligence that causes the injury.

In 1876 a Committee of the House of Commons was appointed to inquire into the legal relations of master and servant with regard to injuries suffered by servants in the course of their employment. The Committee was re-appointed in the following session, and ultimately reported in favour of amending the common law in two particulars:

(a) Report of House of Commons Committee on Employers' Liability, Parliamentary Papers, 1877, vol. x, iii.

Chap. VI. First, in order to render the master liable in cases where he has delegated his authority.

Amendments
suggested by
their Report

Secondly, in order to narrow the doctrine of common employment to those cases where each servant is an observer of the conduct of the other, and can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require.

The outcome of this Report was the Employers Liability Act, 1880, which we are now to consider. (c)

Fry, L.J.'s
criticism.

Fry, L.J.'s criticism of the act in *Whitley v. Holloway* (b) is indubitably just: "It appears to me to be a piece of legislation which does not carry into effect any one simple idea, but is, on the contrary, a compromise, so to speak, between two contending schemes of legislation or lines of thought on the subject of the liability of a master

(a) 13 & 14 Vict. c. 42. The Colonies have generally adopted similar legislation. In Newfoundland the British Act is followed *verbatim*. In New South Wales the existing Act is one of the year 1837 (61 Vict. No. 281), in the Queensland Act (59 Vict. No. 21) there is a provision forbidding contracts to exclude the Act; in Victoria, an Act (50 Vict. No. 891), in terms almost identical with the Act of the United Kingdom, is amended by The Employers and Employees Act, 1890, No. 1057, and this is amended in 1891 by an Act, No. 1219. In Ontario the statute in force is 55 Vict. c. 30 (Ont. Rev. Stat. 1897, c. 160), which, while adopting the essential features of the English Act, makes considerable additions. In New Zealand the Act is 46 Vict. No. 20, and applies to Crown servants. In Quebec, the doctrine of common employment, I am informed by a kind correspondent, has never been a part of the law of that province. Mr. Justice Burdette, of the Exchequer Court of Canada, has so decided in *Thoulet v. The Queen*, 4 Ex. C. R. 181, *Grenier v. The Queen*, 4 Ex. C. R. 276. See also *Robinson v. Canada Pacific Ry. Co.*, [1892] A. C. 481. In Nova Scotia "The Employers Liability Act" was passed in 1900. In Massachusetts too the Act is a close copy of the British Act, and this has been the occasion of a special rule of interpretation, that the Massachusetts Courts must assume that the Legislature with the words of the English Act accepted the interpretation placed on them. *Ryalls v. Mechanics Mills*, 160 Mass. 190; and this canon has been accepted by several other States. *Labatt, Master and Servant*, 1980; where the Acts in force in different States are given textually.

(b) 62 L. T. 680, 640.

to an *employé*. Every word of it represents the result of a conflict or struggle of thought. Its main object, according to Lord Watson, *(a)* was "to place masters who do not upon the same footing of responsibility with those who do personally superintend their works and workmen by making them answerable for the negligence of those persons to whom they entrust the duty of superintendence, as if it were their own."

Chap. VI.

"The governing principle of the Act is that, in certain circumstances, presently to be considered, a workman *(b)* shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work," where personal injury *(c)* is caused to him in the manner indicated in the first section of the Act.

Governing principle of the Employers' Liability Act, 1900.

It has been decided, and perhaps somewhat superfluously reported, that "the relation of employer and employed" must exist, and be set forth by the pursuer, to warrant action under the Act; *(d)* and further, "that the Act has no application where a man is conducting his own business, and where the fault, if any, is imputable to himself", *(e)* or where the injury arises from pure accident, *(f)* even though

(a) Smith v. Baker, 1891 A.C. 513.

(b) Section 1. Thomas v. The Great Western Railway Co., 10 F.L.R. 214.

(c) The principles determining legal responsibility for personal injuries are treated *ante*, 19 *et seq.* "The words personal injury are, it is evident from the context used in their ordinary or popular sense, as meaning physical injury to the person, including injuries to health, such, for example, as may be caused by defective sanitary arrangements." Spence and Younger, Employers and Employed, 218.

(d) Nicolson v. Macandrew, 15 R. 854, Sweeney v. Duncan, 19 R. 870.

(e) Bruce v. Barclay, 17 R. 811, per Lord Young, 814.

(f) Callender v. The Carlton Iron Co., 9 T.L.R. 646, (C.A.), 10 T.L.R. 866 (H.L.). Bowen, Negligence (3rd. ed.), 641, 558.

Chap. VI. the possibility of the occurrence of such an injury might be
 ——— obviated by extreme precautions. (a)

Objects of
the Act.

Lord Young in
Morrison v.
Baird.

Webb v.
Ballard.

The object of the statute has been most diversely regarded. The most accurate estimate of its scope is that of Lord Young in *Morrison v. Baird & Co.*, (b) where he says that the Employers Liability Act "does no more than remove a defence, in the class of actions to which it refers, which was theretofore competent, by providing that an employer against whom such action is raised shall not, in certain circumstances specified in the statute, be entitled to plead what the common law entitled him to plead— that he is not responsible to one employee for the fault of others. The statute does no more than remove that defence in certain specified circumstances"; or, as it is put by Smith, J., in *Webb v. Ballard*, (c) "That the workman, when he sues his master under the provisions of the Act for any of the five matters designated in it, shall be in the position of one of the public suing, and shall not be in the position a servant theretofore was when he sued his master; in other words, that the master shall have all the defences he theretofore had against any one of the public suing him, but shall not have the *special* defences he theretofore had when sued by his servant." The same learned judge, in the same judgment, (d) states that he regards the result of this to be that "the defence of common employment, and

(a) *Thomson v. Dick*, 19 R. 804

(b) 10 R. 278, *McAvoy v. Young's Paraffin Co.*, 9 R. 100, *Daily v. Bentlie*, 20 Sc. L. R. 92. *Morrison v. Scottish Employers' Liability and Accident Assurance Co.*, 16 R., 212, where a policy to indemnify an employer for "all sums which such employer shall become liable for, under or by virtue of the Employers Liability Act, 1880," was held not to render the insurer liable for damages recovered in a common law action, though the circumstances were such that damages might have been recovered under the Act.

(c) 17 Q. B. D. 125.

(d) *L. c.*, 125.

also the defence that the servant had contracted to take upon himself the known risks attending upon the engagement are taken away from him [the employer] when sued by a workman under the Act." To the same effect is Lord Esher, M.R. (a) "It has been suggested that this Act has only the effect of doing away with the doctrine of the immunity of the master from damage arising from the negligence of another servant in the common employment of the master. To my mind it is clear that the statute has taken away from the master another defence"—that the servant undertook to take all the ordinary risks incident to the employment, unless they were concealed or known to the master and not to the servant. (b) It is apparent, notwithstanding, on consideration that the Act has not "the effect of doing away with the doctrine of the immunity of the master for damage arising from the negligence of another servant," otherwise the limitations in sub-sections 2, 3, 4, and 5 of section 1 would be unnecessary; (c) while the operation of the sub-sections is to do away with so much of the "doctrine," etc., as is included within their scope, and the absence of any other legislation leaves what is not included within them still subsisting.

Chap. VI

Lord Esher,
M.R., in
Thomas v.
Quartermaine,

As to the second alleged operation of the Act, that "it has taken away the defence from the master that the man undertook to take all the ordinary risks incident thereto," on the assumption that this is so, it is curious to note that

Effect on the
defence that
the workman
undertook the
risks of the
employment.

(a) Thomas v. Quartermaine, 18 Q. B. 11 688

(b) Lord Esher, M.R., in Yarmouth v. France, 19 Q. B. D. 653, 654, says, "I never entertained a doubt that the Employers' Liability Act does not prevent the proper application of the maxim *Volenti non fit injuria*; and I can only say, as an excuse for the part I took in Thomas v. Quartermaine, that that doctrine had never been mentioned on the argument of that case, but was for the first time suggested in the judgment of my brother Bowen."

(c) McGiffin v. Palmer's Shipbuilding Co., 10 Q. B. D. 5; Shaffers v. General Steam Navigation Co., 10 Q. B. D. 956; Kellard v. Rooke, 19 Q. B. D. 585, 21 Q. B. D. 367.

Chap. VI. the objects laid down by the House of Commons Committee's Report on the Employers' Liability specifically exclude this. The suggestion was to narrow the doctrine of common employment to those cases where each servant "is an observer of the conduct of the other, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precaution and employ such agents as the safety of the whole party may require" (a)

View of the
majority of the
Court of Appeal
in *Thomas v.*
Quartermaine.

Bowen, L.J.

Moreover, the judgment of the majority of the Court in *Thomas v. Quartermaine* (b) establishes that the view of Lord Esher, M.R., is not a correct reading of the Act. "An enactment," says Bowen, L.J., (c) quoting the first section, "which distinctly declares that the workman is to have the same rights as if he were not a workman, cannot, except by violent distention of its terms, be strained into an enactment that the workman is to have the same rights as if he were not a workman and other rights in addition. It cannot in the case of a defect in the employer's works be distorted into the meaning that a new standard of duty is to be imposed on the employer as regards a workman which would not exist as regards anybody else. If the language of the section were not even so precise, the point would be concluded, one might well think, by the observation that if the Act had intended to prescribe some new measure of duty the least one might expect would be that it should define it." Fry, J.J., adds: (d) "If the workman is to have the same rights as if he were not a workman, whose rights is he to have? Who are we to suppose him to be?

(a) These words are adopted by the Committee from the judgment of Shaw, C.J., in *Farwell v. Boston Rd. Corporation*, 3 Macq. (H. L. Ser.) 319

(b) 18 Q. B. D. 685

(c) *Ibid.* 692

(d) *Ibid.* 700.

I think that we ought to consider him to be a member of **Chap. VI.**
 the public entering on the defendant's property by his invitation. Can such a person maintain an action in respect of an injury arising from a defect, of which defect and of the resulting damage he was as well informed as the defendant? I think not. To such a person it appears to me that the maxim *Volenti non fit injuria* applies" (a)

The common law doctrine may be taken from the statement of Lord Esher, M R : (b) " Before the Employers Liability Act there was this condition in the contract of hiring, that, if there was a defect in the premises or machinery which was open and palpable, whether the servant actually knew it or not, he accepted the employment subject to the risk." There are, doubtless, expressions by other judges, and by the same judge in other cases, superficially at variance with this, which have been elsewhere collected and considered, (c) but subject to the minor distinction there considered in full the outcome of the principle is as thus stated. What, then, is the effect worked by the Employers Liability Act on the principles of the common law?

We have already seen that the central conception of ^{scope of the Act} the Employers Liability Act, 1880, is to place the workman in the same position with regard to the employer, in certain enumerated circumstances, as would be held by any person not in the employment suffering injury.

(a) The Supreme Court of Victoria had previously arrived at the same conclusion. *Davison v Wright*, 13 Vict L. R. 151. The New South Wales case of *Sumat v Silva* 8 N. S. W. R. (Law) 115, is at common law, and holds that, where a plaintiff's knowledge is equal to the defendant's, the rule involved in *Volenti non fit injuria* applies. There the plaintiff was the engineer of a steam-tug. See, too, the Scotch cases, *McAvoy v. Young's Parallel Co*, 9 R. 100, *Morrison v. Baird*, 10 R. 271, *Robertson v. Russell*, 12 R. 634, and the principles noticed, *ante*, 7, 29.

(b) *Yarmouth v. France*, 19 Q. B. D. 653.

(c) *Ante*, 30.

Chap. VI. The consideration of the definition of a workman under the Act will for the present be deferred; and before we proceed to consider the way in which the common law is affected by the Act, it is convenient to analyse somewhat minutely a term that is constantly cropping up in the consideration of the Act—"in the service of the employer."

SERVICE OF THE EMPLOYER

Service of the
employer.

"In the service of the employer" means in the service at the time of the accident; so that a man who was promised a job on the following day, but came too late to take it, and, while leaving the premises, was injured, was held not within the words. (a)

A man who has left work and is going home, from no apprehension of danger but to subserve some private end, and who is injured in going, is still regarded as in the service of his employer. (b)

A workman conveyed to and from his work in a "pick-up train" was injured as he was returning from his work. He was none the less in the service of the employer because his day's work was finished; "for it was part of his contract that he was to be carried by the train to and from the place where his work happened to be." (c)

But more than this: a workman may in some circumstances be held to be in the service of the employer, though the service has in fact been terminated and the workman discharged; as where a workman was discharged from working in a mine on Saturday night, and sustained injuries

(a) *Lovell v. Charrington*, 72 L. T. Newspaper 856.

(b) *Brydon v. Stewart*, 2 Macq. (H. L. Sc.) 90.

(c) *Tunney v. Midland Ry. Co.*, L. R. 1 C P 291; cf. *Rohl v. Metropolitan Railway Co.*, 7 T. L. R. 2; and *Vickery v. G. R. Ry. Co.*, 14 T. L. R. 502.

while in the mine on the following Monday morning. His presence there was, however, explained by a rule that workmen on being discharged were not to receive their wages till they returned their tools. He was in the mine for this purpose when he was injured. It was held he was in the pit by reason of his employment. (a) Chap. VI.

The question of employer or not employer is thus a question of fact; and questions of whether workmen who stay on the premises after working hours are there in the course of the employment or not must also be solved as questions of fact. Who is employer
a question of fact

In *Swainson v. North-Eastern Ry. Co.*, (b) Bramwell, L.J., intimates that in order to determine who is an employer there are four principal criteria which should in the first instance be looked to:— Tests to determine who is employer

- (1) Between whom is the engagement for service made?
- (2) To whom does the workman look for payment of his wages?
- (3) Who has the power of discharging him? and
- (4) Whose orders is he bound to obey?

Of these criteria the last is the most important. Of these criteria the last is the most important. Control.
Crompton, J., (c) indeed proposes as the test "whether the defendant," the alleged master, "retained the power of controlling the work."

In *Charles v. Taylor* (d) the engagement was made between the plaintiff and a man in the defendant's employ

(a) *Cowler v. Moresby Coal Co.*, 1 T. L. R. 575.

(b) 47 L. J. Q. B. 972 at 975, *cp. per* Coleridge, J., *Martin v. Temperley*, Q. B. 11 298 at 313.

(c) *Sadler v. Henlock*, 4 F. & B. 570 at 578. *See per* Lord Coleridge, J.J., *Turner v. G. E. Ry. Co.*, 33 L. T. (N. S.) at 438.

(d) 8 C. P. D. 492.

Chap. VI. as one of a gang of "humpers." The defendants paid one of the gang, who afterwards distributed the pay among the members. The defendants had the power of dismissing the plaintiff. He was held to be their servant.

In *Turner v. Great Eastern Ry. Co* (a) the defendants neither engaged, paid, could discharge, nor had control of the workman and thus he was not in their employment.

In *Murray v. Currie*, (b) Bovill, C.J., lays stress on the "control."

In *Dunovan v. Laing, Wharton and Down Construction Syndicate*, (c) the defendants engaged the man who caused the injury, paid him, had the power of discharging him, but at the time of the accident had lent him to another firm. As they had not the power of control they were held not his employers so as to be liable.

The same elements are again to be found in *Claridge v. Union Steamship Co.*, where a similar conclusion is arrived at. (d)

No evidence of control.

If, as in *Dunovan v. Laing, Wharton and Down Syndicate* (c), the evidence is clear that the entire and absolute

(a) 31 L. T. (N. S.) 111.

(b) L. R. 6 C. P. 21.

(c) [1893] 1 Q. B. 629. See *Jones & Sons v. Southall*, [1898] 2 Q. B. 565, where *Quinn v. Burnett* G.M. & W. 190 is distinguished. *Dewar v. Tesker, Ltd.*, 21 T. L. R. 259, *Parkins v. Stend*, 23 T. L. R. 431, *Abrahams v. Bullock*, 85 L. T. 237, was decided by Ridley, J., on his view of the particular facts. There was no contract to supply a brougham, horse and man for a known purpose, was fixed with liability in respect of the incidents of the contract. Though very apparently distinguishable, *Abrahams v. Bullock* was followed by Walton, J., in *Cheshire v. Bailey*, where the wrongful act was the felony of the driver, and was overruled by the Court of Appeal, [1905] 1 K. B. 237: the jobmaster was "not responsible for the consequences of the crime committed by the driver in this case, which was clearly outside the scope of his employment."

(d) [1894] A. C. 185. *Carriv v. Clyde Navigation Trustees*, 35 Sc. L. R. 808.

(e) [1893] 1 Q. B. 629. In *Masters v. Jones*, 10 T. L. R. 403, the

control is with the person to whom the servant is lent, the judge may withdraw the case from the jury. If the evidence is not clear, the *onus* is on the defendant to make out that he has no control; and the jury have to say what the agreement is, and whether the defendant has given up all right of interference. (a)

Chap. VI.

In every case in which a person has been held to be in control of a servant, who, for general purposes, was the servant of some one else, there has been some fact or clause of an agreement which led to that conclusion. (b)

SCOPE OF EMPLOYMENT.

Williams J. of New Zealand happily expresses the law "The right to take the work out of a man's hands is one thing; the right to see that he is to continue the work and direct him during its continuance is another. It is only in the latter case the right to control exists, and the existence of that right is the test of liability." (c)

The employer is never liable where the servant acts without authority—that is, without authority express or implied. The cases of express authority are easy to deal with. The difficulty comes in in determining whether an authority is to be implied. If it is the law estops the master from averring that the act is not his: because he has placed the servant in a position from which a power to do similar acts would flow in natural course.

Employee only liable where servant acts with authority.

The principle of this liability is an irrebuttable presumption that the master authorized every act done in

Principle.

question was whether the plaintiff was "in the sole and exclusive service" of the defendant. It is as to the position of a man "who took work from the pottery," *Chambers v. Amesley*, 6 Q. B. D. 182.

(a) *Cabulane v. North Metropolitan Ry. & Canal Co.*, 12 T. L. R. 611.

(b) Per Williams, L. J., *Waldock v. Winfield*, [1901] 2 K. B. 596 at 608.

(c) *Patonson v. Fleming*, 23 N. Z. L. R. 676, 703.

Chap. VI. advancement of the master's business, pending the authority, and covered by it objects. (a)

Where the servant has been lent to another employer for the performance of particular work, while engaged in it he ceases to affect the employer lending him with liability arising out of the work for the doing of which he has been lent. (b)

Secret
Instructions.

"The law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability." (c)

Willes, J., in
Barwick v.
English Joint
Stock Bank.

The statement by Willes, J., (d) of the principle of law determining the scope of employment, is classical: "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. (e) That principle is acted upon every day in running-down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad improperly selling the cargo. (f) It has been held applicable to actions of false imprisonment, in cases where officers of railway companies, entrusted with the execution of bye-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the bye-laws. (g) It has been acted upon where

(a) See per Kelly, C.B., in *Havley v. Manchester, Sheffield and Lincolnshire Ry. Co.*, L. R. 8 C. P. 118 at 152.

(b) *Donovan v. Laing, Wharton and Down Construction Syndicate*, [1898] 1 Q. B. 629.

(c) Per Willes, J., *Lampus v. London General Omnibus Co.*, 1 H. & C. 526 at 539.

(d) *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259 at 265 *et seq.*

(e) See *Laugher v. Pointon*, 5 B. & C. 547 at 551.

(f) *Ewbank v. Nutting*, 7 C. B. 797.

(g) *Goff v. G. N. Ry. Co.*, 8 E. & E. 672, explaining at 688, *Roe v.*

persons employed by the owners of boats to navigate them **Chap. VI.**
 and tako faros, have committed an infringement of a ferry,
 or such like wrong (a) In all these cases, it may be said,
 as it was said here, that the master has not authorized the
 act. It is true, he has not authorized the particular act,
 but he has put the agent in his place to do that class of acts,
 and he must be answerable for the manner in which the
 agent has conducted himself in doing the business which
 was the act of his master to place him in."

On this Bowen, L.J., thus comments "The true rule Bowen, L.J.'s
comment.
 as, it seems to me, enunciated by the Exchequer Chamber
 in a judgment of Willes, J., delivered in the case of
Barwick v. English Joint Stock Bank . . . This definition
 of liability has been constantly referred to in subsequent
 cases as adequate and satisfactory, and was cited with
 approval by Lord Selborne, in the House of Lords, in
Donaldson v. City of Glasgow Bank (5 App. Cas. 317).
MacKay v. Commercial Bank of New Brunswick (L. R. 5
 P. C. 334) is consistent with the principle. It is a definition
 strictly in accordance with the ruling of Martin, B., in
Limpus v. London General Omnibus Co. (1 H. & C. 526),
 which was upheld in the Exchequer Chamber (see per
 Blackburn, J.)" (b)

Lord Herschell's summary (c) is to be added: "If Lord Herschell, 3
in Baumanwell
Manufacture von
Carl Scheibler
v. Furness, . . .
 cannot be disputed, as a general proposition of law, that a
 person who does not himself enter into a contract can only
 be made liable upon the contract if it was entered into by
 one who was his agent or servant acting within the scope of
*Birkenhead Ry. Co., 7 Ex. 36, and see Barry v. Midland Ry. Co., Ir. R. 1
 C. L. 130.*

(a) *Huzzey v. Field*, 2 C. M. & R. 482 at 440

(b) *British Mutual Banking Co. v. Charnwood Forest Ry. Co.* 18 Q. B. D.
 714 at 717; *George Whitechurch, Ltd. v. Cavanagh*, [1902] A. C. 117.

(c) *Baumanwell Manufacture von Carl Scheibler v. Furness*, [1898]
 A. C. 8 at 15.

Chap. VI. his authority; and it is equally indisputable that a liability by reason of a wrong or tort can only be established by proving either that the person charged himself committed the wrong, or that it was committed by his servants or his agents acting within the scope of their authority." (a)

A preliminary difficulty may arise in identifying the servant. There are several cases on this.

A barge runs down a "bar boat." The name of the defendant is proved to be on the barge and the number belonging to the defendant's barge is affixed in accordance with the regulations of the Waterman's Company, but the man in charge of the barge cannot be identified amongst the defendant's men. The plaintiff has discharged the *onus* upon him, and has given *prima facie* evidence that the man in charge of the barge is one of the defendant's men. (b)

Plaintiff is injured through the negligence of a shipkeeper on board a ship laid up in dock for the winter. A certified copy of the ship's register is given in which the defendant's name appears as owner. The defendant is *prima facie* enough to warrant an inference that the person in actual custody is employed by the owner. (c)

An accident occurs through the negligent driving of a cart. There is the name on the cart of the owner of it. This is *prima facie* enough to charge the owner with responsibility for the accident, which may be met by showing the truth of the matter. (d)

The following propositions are submitted as epitomizing the law on the liability of the employer for the tortious act of his workmen :—

(a) This passage does not appear to have been cited in *Hambro v. Binnard*, [1903] 2 K. B. 399, where Bigham, J., at 416 regards such a consideration as "a loose and unsatisfactory test of the liability", but Bigham, J.'s judgment was reversed, [1904] 2 K. B. 10.

(b) *Joyce v. Capel*, 8 C. & P. 370.

(c) *Hibbs v. Ross*, L. R. 1 Q. B. 534.

(d) *Stables v. Riley*, 1 C. & P. 614, as limited in *Smith v. Bailey*, [1891] 2 Q. B. 408 at 408.

PROPOSITION I

The master is liable for his servant's tortious act—

**Liability of
master.**

- (1) If he expressly directs it ;
- (2) If the act is subsidiary or incidental to what has been directed.

(1) If a servant whose duty it is to sell merchandise sells an unsound horse or other merchandise, by direction and connivance of the master to any particular man, if it prove unsound an action lies against the master, for it is his sale for **Illustrations.**

(2) A defendant is employed to lay rubbish near another man's land in order to obstruct the way. He has special instructions not to let any of the rubbish touch the wall on the other man's land. As the rubbish dries it slungles down against the wall. Trespass is brought against the defendant's employer, and held maintainable, as the trespass alleged is the natural consequence of the act ordered to be done and as much the defendant's act as if done by his express command. *b*

PROPOSITION II

An act done by a servant in his master's service is subsidiary or incidental to what has been directed if **Subsidiary or
incidental act.**

- (1) Where the object of the servant in doing the act is the advancement of his master's interest in the business committed to the servant.
- (2) Where it flows as a natural result from the business committed to the servant.

- (a) Y. B. 9 H. VI., 53 *b*, Prop. II.
- (b) *Gregory v. Piper*, 9 B. & C. 591.

Chap. VI.

- (3) Where it is done at a time when the servant is acting in the course of the business committed to the servant.

Illustrations

(1) An omnibus driver, contrary to custom, endeavours to obstruct the passage along the road of an omnibus belonging to another person. In consequence the second omnibus is overturned. The employer of the first omnibus driver is liable. (a)

(2) A man and his groom are riding past a waggoner who is driving three horses with a waggon. As they pass the master puts his horse to a trot. The groom spins his to keep up with his master. The horse strikes out and injures the waggoner. The groom is negligent in what he did, and the master is liable. (b)

(3) A master selecting a coachman believed to be sober, sends him out with orders to drive quietly. The coachman gets drunk, drives furiously and runs over some one. The master is liable. (c)

(a) *Lumpus v. London General Omnibus Co.*, 1 H. & C. 325.

(b) *North v. Smith*, 10 C. B. (N. S.) 572. See also *Gregory v. Piper*, *supra*. In *Gregory v. Belfast Tramway Co.*, 1901 2 I. R. 323, the injury arose from two servants running horses on the highway.

(c) Per Blackburn, J., *Williams v. Jones*, 3 H. & C. 602 at 609, per Parke, B., *Quarman v. Burnett*, 6 M. & W. 490 at 510, also *Storey v. Ashton*, L. R. 4 Q. B. 476. *Quarman v. Burnett* is distinguished in *Jones & Sons v. Sculland*, [1908] 2 Q. B. 565. In the evidence of Mr R. S. Wright, before the House of Commons Committee on Employers' Liability, Parliamentary Papers, 1876, Vol. IX., quest. 605, the following case is put: "Supposing a mine employed in a coal mine (assuming him to be a servant) improperly and contrary to orders, for the purpose of lighting his pipe or anything of that sort, opens his safety lamp, and there is an explosion, which kills a passer-by." *Williams v. Jones*, 3 H. & C. 609, per Keating, J., at 612 supplies the answer, that the mine owner would not be liable; since "the act of lighting the pipe" was not "in any way whatever for the benefit of his master, or in the furtherance of the object of his employment." To render the employer liable the thing done or omitted by the workman, from which the liability is charged to arise, must be "for the purposes of his master and in the course of his employment." The decision in *Crocker v. Chicago & N.-W. Rd. Co.*, 17 Am. R. 501, the case of the liability of a railway company for the misbehaviour of a "conductor" in kissing her, has been attempted to be defended on principles of English law by directing attention to the large powers these officers are entrusted with. But the English rule is based on the principle, not on any question of degree of power or confidence. In the illustration given above if a fellow servant had been with the coachman and been injured through his drunkenness the master would not be liable; for the master does not warrant his coachman to his fellow servants. His duty is only to use reasonable care in selecting them. *And*, 84.

PROPOSITION III

"Business committed to the servant" includes as well all acts done by an imbecile, reckless or negligent servant in the prosecution of the master's interests committed to the servant, as those acts done in direct and necessary furtherance of the ends proposed by the master and undertaken by the servant.

includes as well
acts done to the
servant

A railway porter seeing a man in a railway carriage, conceives the mistaken notion that he is wrongly there, and pulls him out. The man is right, the porter is wrong. The railway company's direction is, by general order, to prevent persons travelling in the wrong carriage if possible, accompanied by a caution not to remove them from the carriage. The company is liable (a).

The manager of a furniture business conducted on the hire-purchase system sells furniture to a lodger in the plaintiff's house. On default of payment he seizes the furniture and removes it. In doing so he assaults the plaintiff. The employer is liable (b).

An omnibus conductor, in the absence of the driver during the dinner-hour, drives the omnibus through some by-streets and runs over the

(a) *Bayley v. Manchester, Sheffield and Lincolnshire Ry. Co.*, 1. R. 7 C. P. 415, in Ex. Ch. 1. R. 8 C. P. 118. See *Richards v. West Middlesex Waterworks Co.*, 15 Q. B. D. 660, *Whitman v. Peterson*, 1. R. 9 C. P. 122.

(b) *Tyler v. Munday*, 1895 1 Q. B. 712. As to a partnership *Hamilton v. John Jackson & Co.*, 1903 1 K. B. 81. Collins, M.R., summarizes the law at 85: "It is too well established by the authorities to be now disputed that a principal may be liable for the fraud or other illegal act committed by his agent within the general scope of the authority given to him, and even the fact that the act of the agent is criminal does not necessarily take it out of the scope of his authority. If the act done by the agent is within the general scope of the authority given to him, it matters not for the present purpose that it was directly contrary to the instructions of his principal, or even that it may have been an offence against society itself. The test is that which is applied to this case by the learned judge. Was it within the scope of the authority given to Houston to obtain this information by legitimate means? If so, it was within the scope of his authority for the present purpose to obtain it by illegitimate means."

Chap. VI. plaintiff. The plaintiff suing for the negligence of the defendant's conductor has the *onus* on him to show that he was acting in the scope of his employment, but otherwise if he were driving in ordinary course. (a)

PROPOSITION IV

Acts for the purpose of advancing the master's business.

All acts done in carrying out the business committed to the servant are counted within the scope of the employment though, in fact, done contrary to the express instructions of the master, so long as they are done for the purpose of advancing the master's business.

Illustration.

A quarrel arises between the men engaged on a train and those engaged on an omnibus. One of the former gets on the top of the omnibus to get the number. The omnibus driver whips at him to drive him down. The driver's whip strikes a passenger in the eye and injures him. He brings his action against the omnibus company and recovers. A rule to set the verdict aside is refused because there is a question for the jury whether the omnibus driver used his whip "to protect himself or his employers against a charge being brought." (b)

PROPOSITION V

Forbidden consequences following on permitted acts.

The master is liable for consequences (the occurrence of which he has given express instructions to guard against) which result, in natural and probable sequence, from acts done in the course of carrying out his orders.

Illustration.

See Gregory v. Piper, the facts of which are set out under Proposition I. (21. (c)

(a) *Beard v. London General Omnibus Co.*, [1900. 2 Q. B. 530

(b) *Ward v. London General Omnibus Co.*, 42 L. J. C. P. 265. Kelly, C.B., thus continues the passage quoted in the text "And though the former" (i.e. that the omnibus driver's act was to protect himself) "is more probable, still the other conclusion is possible and reasonably probable, and if the latter were the case, and the driver were so negligent as to hurt a passenger, I think he was guilty of negligence in the performance of his duty."

(c) *Ante*, 145.

PROPOSITION VI

Where the servant acts wilfully and under feelings of irritation, but yet with the object of advancing the interests of the employer which are committed to him, the employer is liable for such wilful and wrongful act.

Defendant's coachman wilfully strikes plaintiff's horses with his whip; in consequence of which they start forward and overturn the carriage. After a verdict for the plaintiff, a new trial is refused on the ground that the end in view in striking the horses is the defendant's service. (a)

PROPOSITION VII

The master is responsible for the negligent act of his servant, so long only as the servant is doing the class of acts, in the doing of which he is guilty of negligence, in the course of his employment as servant. If his conduct excepted to is merely a roundabout way of doing his master's business, the master is liable; but if it is in the prosecution of some object other than the master's business, the master is not liable.

A carman having finished the business of the day returns to employers' shop with their horse and cart, and obtains the key of the stable, which is close at hand, but instead of going there at once he drives out on a journey, upon his own account, and on his way back negligently drives over a man. The employers are not liable, as the carman was not at the time engaged in their business. (b)

(a) *Croft v. Alison*, 4 B. & Ald. 590, see *Seymour v. Greenwood*, 7 H. & N. 755, and *Ward v. London General Omnibus Co.*, 42 L. J. Q. P. 265.

(b) *Mitchell v. Crossweller*, 13 C. B. 237; followed in *Storey v. Ashton*, L. R. 4 Q. B. 476, *Rayner v. Mitchell*, 2 C. P. D. 357. Cp. *Gracey v. Belfast Tramway Co.*, [1901] 2 Ir. R. 323.

Chap. VI.**PROPOSITION VIII****Wilful trespass
of the servant**

Where the act of the servant causing injury is a wilful trespass, done from private malice, or a fraudulent act and without regard to the business of the employer, the employer is not liable in respect of the same.

Illustration

Defendant's servant wilfully drives his master's carriage against the plaintiff's house. The defendant is not liable for the injury. (a)

A shopman having a just measure supplied him by his employer for the purposes of the business has a false one made for himself so that he may commit a fraud for his own gain. The employer is not liable for the fraud. (b)

A shopman who, while using the measures given to him by his employer, takes one of the just measures into an unjust measure will affect his employers with the possession of the measure so falsified. (c)

The subman of an oil company is sent out with a cask of oil and two just measures. Defective measures are stored away in a separate part of the oil company's premises till they can be rectified. By the Weights and Measures Act 1878 (41 & 42 Vict. c. 41) s. 25 every person who is in "possession for use for trade" of a false or unjust measure is punishable. The subman obtains one of these, which he uses to commit a fraud on his own account. The oil company is not in "possession for use for trade" of the defective measure. (d)

PROPOSITION IX**Act outside the
employment**

Where the act of the servant is done for the advancement of the master, but is concerned with matters other

(a) *McManus v. Crickett*, 1 East 107.

(b) *Anglo-American Oil Co., Ltd. v. Manning*, [1908] 1 K. B. per Channell, J., 543.

(c) *Ibid.*, 1 K. B. per Channell, J., 543.

(d) *Ibid.* [1908], 1 K. B. 586.

than those entrusted to the servant by the master, the **Chap. VI.**
master is not liable in respect of the same.

An acting bank manager directs the prosecution of a person whom he charges with stealing a cheque belonging to the bank. The person prosecuted brings an action against the bank for the act of their officer. The arrest and prosecution of offenders is not within the ordinary routine of banking business and therefore not within the ordinary scope of a bank manager's authority. (a)

PROPOSITION X

It is the duty of an employer engaged in business emergencies, either himself to be available, or to have some representative available and clothed with authority, to deal without delay with all exigencies reasonably and probably likely to arise in the course of the conduct of business.

A person is arrested for travelling on a railway without a proper ticket by an inspector of the company acting under the direction of the superintendent of the station. By the Railway Clauses Consolidation Act, (b) a penalty is imposed on any person travelling on a railway without having paid his fare, with intent to defraud, and power is given to all officers and servants on behalf of the company to apprehend such person. The superintendent is the person in supreme authority at the station. A jury is warranted in inferring that such an officer has power to act in the matter of an arrest so as to bind the company. (c)

(a) Bank of New South Wales v. (1890) 4 App. Cas. 270, where the cases are considered in the judgment delivered by Sir Montague E. Smith. See per Lord Esher, M.R., in *Abrahams v. Denkin*, [1891] 1 Q. B. 516 at 521, *Boord v. London General Omnibus Co.*, [1900] 2 Q. B. 530, *Gillespie v. Hunter*, 35 Sc. L. R. 71. *Post*, 151.

(b) 8 & 9 Vict. c. 20, ss. 103, 101.

(c) *Goff v. (1) N. Ry. Co.*, 8 E. & E. 672, followed *Moore v. Metropolitan Ry. Co.*, L. R. 8 Q. B. 36; *Edwards v. Midland Ry. Co.*, 6 Q. B. D. 287.

Chap. VI.

PROPOSITION XI

Act not lawful
for the
employer.

An employer is not liable for the act of his servant where the act, in respect of which he is sought to be made liable, is one which, although professedly done in the employer's interest and under his authority, could not lawfully be done by the employer, and is one for the doing of which the employer has given no express authority.

Illustrations.

A station-master in the employment of a railway company takes a person into custody, alleging that he has not paid the fare for a horse that has been runned on the railway. By statute (a) there is authority to arrest and detain any person travelling on the railway without payment of the fare. In the case of goods not paid for, the only power is to detain them. As then the station-master's employers have no power to arrest, there can be no authority implied from them to him to do so (b).

An officer expressly appointed to watch property takes an innocent person into custody on the charge of stealing to vindicate the law. His employers are (probably) liable (c).

A barman is superintending the delivery of mineral waters into the cellar of the public house where he is employed under a manager. The manager, in the mistaken belief that the barman is using the occasion to remove whisky from the cellar, gives him into custody. The owner is not liable for the manager's act (d).

(a) 8 & 9 Vict. c. 20, ss. 103, 104. See Statute Law Revision Act, 1892 (55 & 56 Vict. c. 14), sched., and also the Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), s. 5.

(b) *Poulton v. L. & S.-W. Ry. Co.*, L. R. 2 Q. B. 791; *Charleston v. London Tramways Co.*, 4 T. L. R. 157 (H. A.) at 629. See also *Bolingbroke v. Swindon Local Board*, L. R. 9 C. P. 575.

(c) See per Brett, J., *Edwards v. L. & N.-W. Ry. Co.*, L. R. 5 C. P. 445 at 451.

(d) *Hanson v. Waller*, [1901] 1 K. B. 300, citing *Jones v. Duck*, *The Times* newspaper, 10th March, 1900, where Smith, J., is reported to have said that "the cases showed that a servant had an implied authority to give a person into custody if it was necessary to do so in order to protect the master's property." But that does not apply here, because the master's property was safe before the plaintiff was given into custody. The cases also showed that a servant might have such an implied authority derived from the exigency of a particular occasion."

PROPOSITION XII

A servant has no implied authority to take steps for the punishment of a person whom he supposes to have done some wrong to his master's property, when the property itself is safe and the object in view is not its preservation but the vindication of justice.

No implied authority to servant to vindicate justice

A man takes a ticket at one of the stations of a railway company. He tenders in payment a two-shilling piece. Among the change handed to him is a French two-son piece, which the man refuses to accept and the book-keeper to take back. The man then reaches over the counter to put his hand into a bowl containing copper coin. The book-keeper seizes him, calls a policeman who takes the man to the station, and there he is locked up for the night. The act of the book-keeper does not render his employer liable.

Illustrations

A man tenders in payment non-convertible coin at a public-house bar. It is refused, taken back, and legal tender substituted. The man leaves the bar, is followed by the manager of the establishment, and given into custody on a charge of attempting to pass bad money. The proprietor of the public-house is not liable for his manager's act.

PROPOSITION XIII

When a servant has reasonable grounds for believing that property of his master entrusted to his custody has been wrongfully taken therefrom, he may detain a person whom he reasonably suspects as the wrongdoer, in order to regain possession of the property; or to retake possession of the property. If he acts he must not be guilty of unnecessary violence.

Implied authority to protect property.

(a) *Allan v. G. & S. W. Ry. Co.*, 14 B. 612, B. 65. See *Knight v. North Metropolitan Tramways Company*, 14 T. L. R. 286.

(b) *Abraham v. Deakin*, [1891] 1 Q. B. 516, followed in *Stedman v. Baker & Co.*, 12 T. L. R. 451. *Harrison v. Waller*, [1901] 1 K. B. 390.

Chap. VI.**Illustrations**

Rabbits are wrongfully started and killed on the land of a landowner. They are then conveyed in bags to a railway station, there to be delivered to a purchaser from the wrongdoer. At the station the servants of the landowner take possession of them on his behalf and as his property. The servants are justified in doing so (a)

A man is charged with stealing a railway ticket. The ticket clerk and station-master have reasonable grounds for believing the man charged had abstracted it and is retaining it. They detain the man in order to regain possession of the ticket. They have implied authority to do so. (b)

PROPOSITION XIV**No double recovery.**

* Where injury has been occasioned by an act of the servant acting within the scope of his employment, either the master can be rendered liable or the servant; but not first one and then the other. They may be jointly proceeded against.

Illustration

A cabman is injured through the tortious driving of an omnibus driver. The driver is summoned, tried and ordered to pay compensation to the cabman under 6 & 7 Vict. c. 86, sec. 28. The cabman subsequently brings an action against the omnibus driver's employer. He is not entitled to maintain it (c)

(a) *Blades v. Hagg*, 11 H. L. C. 62

(b) *Van De Wynde v. Ulster Ry. Co.*, 5 H. R. C. L. 328, per Monahan, C.J., Pigot, C.B., and Lawson, J.

(c) *Wright v. London General Omnibus Co.*, 2 Q. B. D. 271. In *Brinsmead v. Harrison*, L. R. 7 C. P. 547, the Ex. Ch. held that a judgment in an action against one of two tortfeasors is a bar to an action against the other for the same cause. In *Merryweather v. Nixon*, 8 T. R. 186, it was held that if A recovers in tort against two defendants and levies the whole damage on one, that one cannot obtain contribution from the other. This was qualified in *Adamson v. Jarvis*, 4 Bing. 66, by the statement that the rule "is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." See also *Palmer v. Wick and Pultney-Town Steam Shipping Co.*, [1894] A. C. 318, and the statement, made there, explained in *The Englishman and The Australia*, [1895] P. 212 at 216. *The Frankland*, [1901] P. 161.

PROPOSITION XV

An employer is not criminally liable for the act of his ^{criminal} servant, unless he is made so—_{liability}

- (1) By Statute (*a*), or
- (2) By reason of the act of the servant being obviously the act of the master; or
- (3) Where he is an accessory.

(1) A master baker has two establishments. At one a fireman ^{illustration} manages the business. The fireman uses alum in making the bread, contrary to the Statute 36 Geo. III. c. 22, see 3, (*b*). He states that his master does not know of the use of the alum, but considerable doubt is thrown upon this statement. The master is liable for the act of his fireman, (*c*).

Smuggled tobacco is detected concealed in a cellar. A servant in his master's absence procures a permit by which he intends to protect the goods from seizure. The master is liable for the penalty attached to the offence of not duly using a permit, (*d*).

During the absence of his master, the licensed occupier of a slaughter-house, his fireman in direct disobedience of his orders slaughters a sheep in the pound in view of other sheep. Under by-laws made in pursuance of the Slaughterhouses Act, 1874, (*e*) the master is criminally liable, (*f*).

(*a*) "It is a general principle of law that a man is not liable to be indicted criminally for the act of his servant," see *Woodgate v. Knatchbull*, 2 F. R. 118, per Ashurst J. "but a particular Statute may impose this liability upon him by its express terms or by implication," per Collins, J., *Hurdcastle v. Bethy*, 1892, 1 Q. B. 709 at 712.

(*b*) Repealed by the Statute Law Revision Act, 1863.

(*c*) *The King v. Dixon*, 3 M. & S. 11. This decision was rather on the ground that the master had authorized the use of alum, while the Statute showed to be a deleterious ingredient, and he would therefore be answerable if the servant used it in excess.

(*d*) *A-G v. Sudden*, 1 Tyr. 41, see *Mollins v. Collins*, L. R. 9 Q. B. 392, *Cundy v. Le Cocq*, 11 Q. B. 11, 207, and *Cuppen v. Moore* (No. 2) [1898] 2 Q. B. 306, *Finlay v. Nolloth*, [1903] 2 K. B. 264, *Boyle v. Smith*, [1906] 1 K. B. 492, *Anglo-American Oil Co. v. Mardouf*, [1908] 1 K. B. 587.

(*e*) 37 & 38 Vict. c. 67, s. 4 repealed by Public Health (London) Act, 1891, s. 142, sub-s. 1, but by-laws made thereunder are validated by s. 143, sub-s. 2 (*b*).

(*f*) *Collman v. Mills*, [1897] 1 Q. B. 396, where the cases are cited.

Chap. VI. (2) The servant of a bookseller sells an indecent book from his master's stock. The sale is presumed to be the act of the master. (a)

A barman supplies drink to a constable on duty. The publican is liable. (b)

(3) It is obvious that the master is none the less liable as an accessory to a crime because he is in the relation of master to his accomplice, than he would be if no relation of master and servant existed. (c)

We are now in a position to start a detailed consideration of the bearing on the common law of the Employers Liability Act, 1880.

I DEFECT IN CONDITION. (d)

L. Workman to recover where the injury is caused by defect in the condition of ways, works, machinery, or plant, etc.

The workman is to be in the same position as "if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work" (e)—in other words, he is to be in the same position as if he were a licensee (f)—where the injury is caused "by reason of

(a) *For Pollock, B., Roberts v. Woodward* 13 Q. B. 10, 112 at 115. In *Rees v. John Almon*, 20 How. St. Tr. 838, Lord Mansfield said: "I have always understood, and take it to be clearly settled, that evidence of a public sale, or public exposure to sale, in the shop, by the servant, or anybody in the house or shop, is sufficient evidence to convict the master of the house or shop, though there was no privity or concurrence in him, unless he proves the contrary, or that there was some trick or collusion."

(b) *Cundy v. Lezoway*, 13 Q. B. D. 207, *Shearman v. The Rutzen*, 1895] 1 Q. B. 918, where Wright, J., admirably summarizes the law. There is a presumption that *mens rea* is an essential ingredient in every offence. This presumption may be displaced (1) by the words of the statute creating the offence; (2) by the subject-matter with which it deals, both points of view are to be considered. The principal exceptions are—

(a) Acts which are not criminal in any real sense, "but are acts which in the public interest are prohibited under a penalty."

(b) Acts which are public nuisances.

(c) Acts dealt with under criminal procedure which is in reality only a summary mode of enforcing a civil remedy, e.g. unintentional trespass in pursuit of game. *Morden v. Porter*, 7 C. B. (N. S.) 641;

and see previous note, also an article in 105 L. T. newspaper 219, *Kortzen v. West Sussex County Council*, 19 T. L. R. 354.

(c) *Foster*, Cr. Cas. 125. Cp *Brown v. Foot*, 61 L. J. M. C. 110.

(d) *Ante*, 124.

(e) S. 1, sub-s. 1. *Ante*, 124.

(f) *Thomas v. Quartermaine*, 18 Q. B. D., per Bowen, L. J., 693 *Post*, 292.

any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer," where the defect arose from or had not been discovered or remedied owing to : Chap. VI.

1. The negligence of the employer. (*a*)

2. The negligence of some person "in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition." (*b*)

The effect of sub-sec. 1 of sec. 2 is to require negligence of either of these persons to be shown as a condition to making sub-sec. 1 of sec. 1 applicable (*c*). This clause has, to quote Bowen, L.J. *d*), "in the plainest language provided that the master is not to be liable unless for defects that arise through or have remained undiscovered or unremedied owing to the negligence of the employer or his other servants; or, in other words, there must have been a breach of duty before any action will lie."

The employer is bound independently of the Employers' Liability Act to guard the workman against his own personal default, and to see that ways, works, machinery or plant used in the ordinary course of the workman's employment are in proper condition (*e*). (common law duty.)

An effect of the words of the Act is that, although there is a common law right of action against the employer, an action against him may, by virtue of them, be brought under the Act in a County Court where more than £100 damages is claimed, and thus both master and servant are Effect of words in the sub-section.

(*a*) *Ante*, 125

(*b*) S. 2, sub-s. 1. See *Thomas v. The Great Western Colliery Co.*, T. L. R. 244. *Ante*, 125.

(*c*) See Chapter III, Negligence. *Ante*, 49.

(*d*) *Thomas v. Quatermaine*, 18 Q. B. D. 685 at 698.

(*e*) See Props. III., *et seq.*, Chapter II. *Ante*, 21.

Chap. VI. saved the longer and more expensive procedure in the High Court.

It must be noted, however, that an action could not be brought in these circumstances for damages to a greater amount than the estimated earnings of a person in the same grade as the plaintiff for the period of three years preceding the injury. (a)

Consequently, notwithstanding this operation of the section, it will be most advantageous, in the case of serious injury sustained through the personal negligence of the employer, to bring the action at common law, where the amount of damages that may be awarded is unrestricted.

Mr. Spens' view.

Mr. Spens (b) disputes this intention of the Legislature in enacting these words, since they are inapplicable in the Scotch procedure. Their operation, however, in the way stated above, now they are inserted, is plain. Still, this does not preclude another operation. Mr. Spens is of opinion that the words were inserted with reference to sub-sec. 3 of sec. 1 (c), which provides that the workman shall not recover if he fail to give notice to the employer, or some person superior to himself, of any defect or negligence which caused his injury, *unless he was aware* that the employer or superior knew thereof. Their effect would then be to prevent the employer setting up the defence that the workman was working in face of a known danger.

Criticised.

This contention, though countenanced by the judgment of A. L. Smith, J., in *Webbin v. Ballard* (d), is opposed to

(a) S. 3 *Ante*, 126

(b) *Employers and Employed*, 183.

(c) *Ante*, 126.

(d) 17 Q. B. D. 122 at 125: "The defence of contributory negligence is still left to the employer; but the defence of common employment and also the defence that the servant had contracted to take upon himself the known risks attending upon the engagement, are taken away from him when sued by a workman under the Act."

the decision of the Court in *Thomas v. Quartermaine*, where **Chap. VI.**
Bowen, L.J., expresses the view that so far as it is so, "I
think *Weblin v. Ballard* ought to be overruled." (c)

Notwithstanding this, Mr. Spens is still of opinion that
the view expressed by him "would receive effect in
Scotland." (b)

The words "owing to the negligence of the employer"
may not improbably have crept into the Act by reference
to the words of sub-sec. 1 of sec. 1. (e).

To give a right of action it is moreover necessary to defect.
show a defect in some of the specified appliances. In
Heske v. Samuelson, (d) Lord Coleridge, C.J., suggests, as
a test of a defect in the condition of the thing complained
of, the question whether it "was not in a proper condition
for the purpose for which it was applied." This was
adopted by the Court of Appeal in *Cripps v. Judge*. (e)
Thus, where a crane was used to tear up sleepers, and injury
resulted, there was held to be defect in the condition of
the machine. (f)

In *Walsh v. Whiteley*, (g) the county court judge had ^{Walsh v.}
left it to the jury to say whether there was in fact a defect ^{Whiteley}

(a) 18 Q. B. D. 685, 11 at 699.

(b) *Employers and Employed*, Addenda et Errata.

(c) *Idem*, 121.

(d) 12 Q. B. D. 30. The facts in *Murray v. Menzies*, 17 R. 815, are somewhat similar, though the conclusion is different. *Concoran v. East Surrey Iron Works*, 5 T. L. R. 103, where a trolley "was in the usual form, and it was admitted that there was no danger if the stanchions were packed as usual." *Hamilton Bridge Co. v. O'Connor*, 24 Can. S. C. R. 698, *Finlay v. Maccampbell*, 20 Ont. R. 29.

(e) 13 Q. B. D. 588.

(f) *Walsh v. Menzies*, 12 R. 690. Cp. *Bacon v. Dawes*, 8 T. L. R. 557.

(g) 21 Q. B. D. 771. *Smith v. Harrison*, 5 T. L. R. 406. Cp. *Morgan v. Hutchings*, 6 T. L. R. 219, and the comment on the decision, *post*, 166 and 176. In Scotland the pursuer must aver specifically in what respect the ways, works, etc., are insufficient or defective: *Waterson v. Murray*, 21 Sc. L. R. 695. Cp. *McGloherly v. The Gale Manufacturing Co.*, 19 Ont. App. 117; *Southern Pacific Co. v. Seley*, 152 U. S. (45 Davis) 145.

Chap. VI. in the condition of the machine—a carding machine, the disc of the wheel of which was not solid throughout (had the disc been solid the accident could not have happened)—telling them that to be defective it must be such as a reasonable, careful, experienced man, reasonably careful of the safety of his workmen, would not use. The jury found a defect, and on appeal, the Divisional Court were divided. In the Court of Appeal, Lord Esher, M.R.'s view was: (a) "The true question seems to me to be whether the machine is dangerous, and whether a careful consideration would show it to be dangerous to the workman using it. I am prepared to say that if a careful consideration would show a master that the machine was dangerous to the workman using it, even although that machine could not be improved upon, it is negligence on the part of the master to use for his profit a machine which is dangerous to his workman, and, if he does use it, he can only do so upon the terms of being liable to pay compensation to the workman, if he is thereby injured."

View of Lord
Esher, M.R.

Judgment of the
majority of
the Court.

The majority of the Court (Lindley and Lopes, L.JJ.) held that: (b) "There must be a defect implying negligence in the employer. The negligence of the employer appears to be a necessary element without which the workman is not to be entitled to any compensation or remedy. It must be a defect in the condition of the machine, having regard to the use to which it is to be applied or to the mode in which it is to be used. It may be a defect either in the original construction of the machine, or a defect arising from its not being kept up to the mark. (c) but it is essential

(a) 21 Q. B. D. 376. $\frac{1}{2}$

(b) *I. r.* 378.

(c) As an instance how judicial interpretation differs sometimes from the legislative conception of a measure, the following quotation from the *Times* newspaper report of the discussion in the House of Commons Committee on the Employers' Liability Bill, under date August 4, 1880, may

that there should be evidence of negligence of the employer, **Chap. VI.**
or some person in his service entrusted with the duty of
seeing that the machine is in proper condition."

The effect of adopting the principle contended for by Lord Esher, M.R., would, using an illustration given by Lopes, L.J., (a) involve the consequence that giving a workman "an ordinary sharp knife" with which he managed to cut himself would import liability. Apart altogether from the argumentative *inductio ad absurdum*, the Act, as we have seen, requires negligence either of the employer or of a supervisor in his employment. (b) In the opinion of Lord Esher, M.R., the use of a dangerous machine is equivalent to negligence, and the question of negligence is for the jury. This, at least, is not the common law; by which, "all that the master is bound to do is to provide machinery fit and proper for the work, and to take care to have it superintended by himself or by his workmen in a fit and proper manner" (c). The matter for the consideration of the jury is not whether the machinery is dangerous, and therefore defective; but whether the machinery, even if dangerous, is "fit and proper for the

Lord Esher.
M.R.'s view
considered.

be noted "Lord R. (Lynch) said that a farmer would be liable if his servant were injured while riding a horse which, to the knowledge of the owner, was afflicted with nervous disease, or disease in the foot. The Solicitor-General (Sir P. Herschell) said the employer in that case would not be liable, as the disease was not his fault."

(a) 21 Q. B. D. 379. This consequence is accepted by Wills and Wright, J.J., in *Hindle v. Birwistle*, [1897] 1 Q. B. 192, interpreting the words "all dangerous parts of the machinery" in s. 6, sub s. 2, of the Factory and Workshop Act, 1891 (54 & 55 Vict. c. 73).

(b) S. 2, sub-s. 1.

(c) Per Lord Wensleydale, *Woods v. Matheson*, 4 Macq. (H. L. Sc.) 227, *Oxington v. McVicar*, 2 Macph. 1066, *Macfarlane v. Thompson*, 12 R. 232. *Ante*, 26. In *How v. Barrett*, 1 T. L. R. 419 (C.A.), the Lord Chancellor propounded the question whether machinery which had been safely used for three years could be called defective. The point, however, was not decided, the case turning on the facts, though an absolute obligation to have the best machinery was negatived. Absence of an accident may be equally consistent with fortunate negligence as with unfortunate diligence.

R. T. T.

M.

Chap. VI. work," and is properly superintended. "Defective" is not inclusive of "dangerous" at common law. What ground, then, exists for putting a different meaning on the term under the Act? for nowhere is there any different meaning given to it by the Act, and nowhere in the Act is the word used in a sense inconsistent with its accustomed usage.

Defect and defective condition
McClintin v. Palmer's Shipbuilding Co.

In *McClintin v. Palmer's Shipbuilding Co.* (a) the question arose whether the Act drew a distinction between a "defect" merely and a "defect in the condition" of the ways, etc. A workman was employed in the defendant's ironworks to take puddled iron, while at a white heat, upon a two-wheeled hand-car along an iron-plate roadway to a steam-hammer. While so engaged the car struck against a piece of substance, used for lining the funnels, which had got up on the roadway, some of the iron fell upon the workman, who was killed. The Court (Field and Stephen, JJ.) held that this was not "a defect in the condition of the way." "A defect," said Stephen, J., (b) "in the machinery would be the absence of some part of the machinery, or a crack, or anything of that kind. A defect in the condition of the way, or works, or machinery, or plant is certainly wider, but I do not think it is very much wider. If means, I should be inclined to say, such a state of things that the power and quality of the subject to which the word 'condition' is applied are for the time being altered in such a manner as to interfere with their use. For instance, if the way is made to be muddy by water, or if it is made slippery by ice, in either of these cases I should say that the way itself is not defective, but the condition of the way, by reason of the water which is

(a) 10 Q. B. D. 5. (p. *Thomas v. Quatermain*, 17 Q. B. D., per Wilks, J., 417, also *Pratt v. Inhabitants of Weymouth*, 147 Mass. 245, 9 Am. St. R. 691.

(b) 10 Q. B. D. 9.

incorporated with it, or from its being in a freezing state, Chap. VI. is affected." Or, as Field, J., said with regard to the same illustration: (a) "That would be a defect in the condition of the way, because the way is the thing which people walk upon, and the thing itself is actually altered."

The Scotch case of *Mitchell v. Coats Iron and Steel Co.*, (b) in which *McGiffin's* case was cited, seems to lean to a different view; for the employer was held liable for an injury arising through a bar of iron projecting over the way where the injured man was. The Lord Justice-Clerk (Moncreiff), however, said: "We have had difficulty and some difference of opinion in arriving at a decision in the present case. But on the whole matter we are not inclined to disturb the judgment of the sheriff." So that in any view the decision is not of high authority. The subsequent case of *McQuade v. Dixon* (c) leaves the point open; for there the decision is that when an obstruction is taken off and put by the side of a way, and there causes injury, the employer is not liable. (d) The distinction between the two cases is that, in the case where liability was held to exist, the obstruction was *on* the way; in the other case only *by the side of it* (e).

The Court of Appeal, in *Thomas v. Quartermaine*, (f) seems to have assumed that there was a defect in the

(a) *Ibid.*, 8.

(b) 23 Sc. L. R. 108.

(c) 24 Sc. L. R. 727.

(d) *Id.*, see per Lord Young, 728.

(e) In the English case of *Wood v. Donall*, 2 F. L. R. 550, the injury was caused by the absence of a rail to a staircase, which left an opening through which the plaintiff fell, this was held to be a defect in the condition of the way, and rightly, since the stairs are as much part of the way as the ground. Spence and Younger, *Law of Employer and Employed*, 200, are of opinion that the decision in *Mitchell v. Coats Iron and Steel Co.*, 23 Sc. L. R. 108, "must be held in Scotland to overrule the judgment given in the case of *McGiffin*."¹

(f) 18 Q. B. D. 685.

Chap. VI. condition of the works there. (a) The difficulty in the case arose from the operation of sec. 2, sub-sec. 1. A boiling vat and a cooling vat were placed in the same room in the defendant's brewery. A passage only three feet wide in one part ran between them, the rim of the cooling vat rising sixteen inches above the passage. In endeavouring to get a board, used as a lid, from under the boiling vat and which stuck, a man gave an extra jerk, the lid came away suddenly, and he fell back into the cooling vat, which was filled at the time with scalding liquid. In the Divisional Court, however, Wills, J., says: (b) "I can see no evidence of any defect in the condition of either ways or plant. The way as a passage or gangway was safe enough, and as far as appears wide enough for any legitimate use it could be put to as a way. There was no defect in the vat as a vessel to hold liquor to be cooled. The defect, if defect there were, was not in the way, considered as a way, nor in the vat, considered as a vat, but in the proximity of the vat to the place where a piece of board was kept, which piece of board stuck by some accident when required for use." This the learned judge held was not within the test prescribed in *Hesko v. Samuelson* (c) and *Cripps v. Judge* (d).

A workman tripped over something on the floor while in the course of his business passing an aperture to a staircase which was left unprotected. (e) He fell down the staircase and was injured. The Divisional Court refused to set aside the County Court judge's finding that there was a defect in the condition of the way.

(a) This was because the County Court judge before whom the case was tried in the first instance had held that there was a defect in the condition of the works, "and therefore if there is any evidence on which the findings of the learned judge can be supported they must stand good"; per Lord Esher, M.R., *loc. cit.* at 687. See also per Fry, L.J., at 703.

(b) 17 Q. B. D. at 417.

(c) 12 Q. B. D. 30.

(d) 13 Q. B. D. 598. *Idem*, 159. (e) *Wood v. Donall*, 2 T. L. R. 550.

In *Sanders v. Barker* (a) the slackness of the wheel of a pump in a brewery, which needed a slight touch to set it going when the steam was turned on, was held a defect. This case, however, turned more on the point indicated by Lord Coleridge, C.J.'s inquiry: "Is there any case in which the workman having pointed out the danger and asked that it should be remedied, the employer has been held not liable?" Chap. VI.

Wallace v. Carter Paper Mills (b) is referable to the same principle. There a man was killed while pointing out a defect in a calender machine of which he had previously complained. The Scotch Court followed *Smith v. Baker*; (c) as also did the Divisional Court in *Stanton v. Serrinton & Co.* (d) where the precise point decided was that "the absence in the machinery of any sufficient safeguard against such a probable occurrence as a slip in the management of the machinery is a 'defect,'" "and if an injury arises from such slip it was to be attributed to that defect."

Want of instruction in the use of a dangerous machine* does not constitute a defect in the condition of the machine. (e)

In England, *McGiffin's* case was followed in *Pegram v. Dixon*, (f) and it must be taken that the defect in the condition of any of the specified particulars must be of a permanent or *quasi*-permanent nature.

(a) 6 T. L. R. 324.

(b) 19 R. 915, *Wilson v. Love*, 35 S. L. R. 223.

(c) [1891] A. C. 323.

(d) 62 L. J. Q. B. 405; 9 F. L. R. 236.

(e) *Greenwood v. Greenwood*, 24 T. L. R. 21.

(f) 55 L. J. Q. B. 417, the case of a boy throwing a board down an opening through which workmen ascended to the upper portion of a building, the opening having been previously used for the purpose. See *Conway v. Clements*, 2 T. L. R. 90; *Ayres v. Bull*, 5 T. L. R. 202.

Chap. VI.**Willetts v.
Watt**

This is pointed out by the Court of Appeal in *Willetts v. Watt*. (a) A way was constructed to serve a twofold purpose. Its usual function was to serve for purposes of passage; when, however, a lid was removed in the surface there was a well or catch-pit disclosed. The construction was proper for both purposes. It was accordingly held by the Court of Appeal that an accident arising from a workman falling down the well did not arise from "defect in the condition of the way," but rather from a negligent user of it. "It appears to me," said Fry, L.J., (b) "that the language of sub-sec. 1 points to a defect of a chronic character and not to a defect arising from negligent user, and that view is supported by the judgment of the majority of this Court in *Walsh v. Whiteley*, (c) where a defect of condition is contrasted with negligent user." In the particular case of *Willetts v. Watt* (d) the plaintiff was unable to avail himself of this alternative stating of his cause of action, since the particulars were limited to sec. 1, sub-sec. 1.

**Morgan v.
Hutchins.**

Under sec. 1, sub-sec. 1, it was held, in *Morgan v. Hutchins*, (e) that the fact that a machine is dangerous, that is "defective with regard to the safety of the workman" who used it, is a "defect in the condition of the machinery."

(a) [1892] 2 Q. B. 92. Cp. *Moore v. Ross*, 17 R. 796, where Lord M. Laren, 796, speaking of "known danger" says: "One class of cases of this sort is where the master by the adoption of some known and suitable appliance may diminish the danger to his servants, and does not adopt it, in such cases, the rule of the statute as to negligence resulting from defects in the ways, works, or plant will probably apply. But the other class of cases is where the danger is one against which it is perfectly in the power of the servant to guard himself, simply by keeping his eyes open. That is the typical case in which the law says the servant must take the consequences of his own neglect." *Forsyth v. Hamage*, 18 R. 21. *Thomson v. Scott*, 25 R. 54, 54, *Metcalf v. Great Boulder Proprietary Gold Mines* (1906), 3 C. L. R. (Australia), 549.

(b) [1892] 2 Q. B. 100.

(c) 21 Q. B. D. 871.

(d) [1892] 2 Q. B. 92.

(e) 38 W. R. 412, 6 T. L. R. 219. As to defect in the condition of a deck, see per Lord Lee, *Gray v. Thomson*, 17 R. 200.

which entitles the workman to recover damages against his employer for an injury caused by the machine, even though it is effective for the purpose for which it is used. The Court which decided this protested that they were not going to act against the decision of the Court of Appeal in *Walsh v. Whiteley*; yet it is difficult to reconcile their decision with the decision of the majority in that case, where it is said: (a) "It is said there is evidence of the machine being dangerous. So are most machines, so is even an ordinarily sharp knife, unless used with care; but that does not make it defective in its condition, nor does it imply negligence in the employer, if an accident happens, who furnishes it to his workman for him to use with reasonable care."

The phrase of Fry, L.J. "defect of a chronic character" *Tate v. Latham*—in *Willetts v. Watt* (b) was the subject of criticism in *Tate v. Latham*. (c) A movable guide necessary to protect a circular saw had been removed by a workman for convenience in working "and had been left off for some considerable time." A fellow workman was injured in consequence. An argument was addressed to the Court founded on Fry, L.J.'s expression that the defect must be of a "chronic character," that the temporary removal of a saw-guard to facilitate working was not within the Act. Reference to Fry, L.J.'s judgment will show that such a meaning cannot fairly be attributed to his words. The lid there was properly removed to perform one of the dual purposes for which it was constructed. The accident occurred through the workman negligently using it for the other. In the present case the saw was being used for its

(a) 21 Q. B. D. 379.

(b) [1892] 1 Q. B. 100.

(c) [1897] 1 Q. B. 600.

Chap. VI. proper purpose, but without fitting an adjunct necessary for its safe use. (*a*)

Defect connected with or used in the business of the employer.
Howe v Finch.

The defect must further be in the condition of ways, etc., "connected with or used in the business of the employer." This is pointed out in *Howe v Finch*, (*b*) where it was sought to recover for injury caused by the fall of a wall forming part of the defendant's works, and which wall at the time of the accident had not been completed, and had never been used, though it was intended to be used for the business. The Divisional Court held the plaintiff not entitled to recover.

Ways. (*c*)

"Ways."

"Works."

"Ways," says Smith, J., (*d*) "means the ways used in the business, not partly made ways not used. If that is to be so as to 'ways,' it is so as to 'works,' I do not agree that if a whole structure fell or caused damage to a workman he would not have a right of action, for I think that he would. But here it was partly finished. I think 'ways, works, etc.' mean the existing and completed works." (*e*)

(*a*) *Hamilton v Greenbeck*, 19 Ont. R. 76, conflicts with this. The want of a guard was held not a defect in the condition of a saw, "when such guard was no part of the saw, not of the machinery connected therewith, nor at all necessary for any proper or reasonable fitness of the saw for the purpose for which it was used." This point was not raised on the Appeal, 18 Ont. A. R. 437.

(*b*) 17 Q. B. D. 187. *Rae v Milne & Sons*, 24 R. 165. In *Brimmigan v Robinson*, [1892] 1 Q. B. 344, the injured man was not engaged upon pulling down a wall, but was injured by an unsafe wall while he was otherwise employed than attending to it, and so the case is within *Smith v Baker*, [1891] A. C. 825. The work was done in an unsafe way, and was not in its nature unsafe. In *Lynch v Allyn*, 160 Mass. 248, the Court considered these cases to conflict. In *Dayton v Stuart*, 31 Can. S. C. R. 215, the work itself was dangerous. Cp. *Nordheimer v. Alexander*, 19 Can. S. C. R. 248. *Ante*, 30 *Post*, 173.

(*c*) *Ante*, 124.

(*d*) 17 Q. B. D. 190.

(*e*) See *Conway v Clemence*, 2 T. L. R. 90.

This decision must extend to the case of "machinery," **Chap. VI.** etc., brought into a place for the purpose of being used, though not fixed for use. Neither is the employer liable ^{Effect of the decision.} where he has put out the work to be done by a competent contractor and is not guilty of negligence; and where danger is not apparent; (a) nor where the very nature of the work manifestly involves considerable risk, as in securing a tottering wall, and the accident happens in the circumstances denoting the risk. (b)

Where a heavy machine had to be moved over an uneven depression which was filled in with slips of wood covered by a thin covering of iron, and in moving, the slips of wood gave way, and an accident resulted, the Second Division of the Scotch Court of Session held that there was a defect in the condition of a way. (c) In a somewhat similar case, where the plaintiff came out of a mill-yard where she was engaged, and was obliged to pass over a hole in the ground where a weighing-machine was being set up, and over which certain planks were placed, one of which, being loose, tipped up as she stepped on it, and caused her injury, the Court of Appeal held that "the place was a 'way' within the meaning of the sub-section, and the way was defective, and defective owing to the negligence of the defendants, and the defendants were liable." (d)

(a) *Cp Kiddle v Lawitt*, 16 Q B D 605, where a competent contractor was employed to put up a bon staking which was negligently done, but was held not to charge the employer with negligence. *McDonald v Wyllie*, 11 F 399, is at variance with this. But see *Wood v Mackay*, 8 F. 625. *Biddle v. Hart*, [1907] 1 K B 699, *Kettlewell v. Paterson*, 24 Sc. L. R. 95.

(b) See per Day, J., in *Guthrie v London and St Katharine Docks Co*, 12 Q B D. 493, *Ogilby v. Ruminous*, 3 P & F. 751. Also the Scotch cases, *Fisher v. Hood*, 15 B 178, where a stableman, who undertook the care of a horse that he knew to be vicious, was disentitled to recover for injuries received from it. As to this *quere* and see *ante*, 81, and *Mulligan v. M'Alpine*, 16 R. 789, a defective system of blasting; also *Elliott v. Tempest*, 5 T L. R. 154, *Moore v. Gimson*, 5 T. L. R. 177.

(c) *Bowie v Rankin*, 19 R. 981.

(d) *Bromley v. Cavendish Spinning Co.*, 2 T. L. R. 881 (C. A.).

Chap. VI.*Willetts v.
Watts.**Judgment of
Lord Esher,
M.R.**Instances
of "ways."*

In *Willetts v. Watts*, (a) the Divisional Court (Hawkins and Wills, J.J.) put a somewhat forced construction on the language of Field, J., in *McGiffin v. Palmer's Shipbuilding Co.*, (b) and held that to constitute a "way" there must be a "defined way," and one "habitually used" as such. The Court of Appeal disagreed with this construction. "The second of these arguments," says Lord Esher, M.R., (c) referring to the requirement of an habitual use, "is not tenable, for if it were the Act would not apply to the first user of a way, however defined it might be, but would only apply after considerable use of it. I cannot therefore regard habitual user as necessary. Nor do I think that it is necessary the way should be marked out and defined. If a way passes where the user would make no mark and where there are no defined boundaries, is it to be said that is not a way within the Act? Difficulties in so holding have been pointed out in the course of the argument, and I cannot come to that conclusion. The definition which strikes me as sufficient for the determination of this case is—the course which a workman would in ordinary circumstances take in order to go from one part of a shop, where a part of the business is done, to another part where business is done, when the business of the employer requires him to do so, must be regarded as a 'way' within the meaning of the statute."

A temporary staging erected by the side of a wood pile to enable the workmen to place wood thereon and pile it higher, and so movable from time to time, has been held a "way;" (d) so has a temporary derrick at a stone-yard erected to move stones from cars to where stonecutters

(a) [1892] 2 Q. B. 92.

(b) 10 Q. B. D. 8.

(c) [1892] 2 Q. B. 97.

(d) *Prondible v. Connecticut River Manufacturing Co.*, 100 Mass. 181.

could use them; (a) and a plank put down to serve as the fulcrum of a lever where it is placed in such a position that servants have to pass over it in the course of their duties; (b) and a manhole on the side of a railway in a mine so obstructed with rubbish that it cannot be resorted to on the approach of cars. (c) But a mere pile of boards is not (d)

Chap. VI.

When a man is permitted to use a way which is dangerous, while there are other ways for him to use if he chooses, the employer is not liable, in the case of an accident happening, on the ground that he has not made the way safe (e)

The roof of a mine is included in the term "ways." (f)

Apart from the Employers Liability Act, 1880, there have been cases before the Courts involving expressions of opinion on what is a defect in a way; and there is no doubt but that at common law the employer may be liable for the defective condition of ways if he have personal knowledge of the defect and does not remedy it. (g) A person lawfully on the platform at a railway company's station fell upon some ice extending half across it. He was held entitled to maintain an action. (h) So were the representatives of a man killed through an accident caused by the faulty construction of a bridge erected across a railway

Liability at common law.

(a) *McMahon v. McHale*, 174 Mass. 320.

(b) *Caldwell v. Mill*, 24 Ont. R. 162.

(c) *Ferris v. Cowden Heath Coal Co.*, 24 R. 615.

(d) *Campbell v. Deuborn*, 175 Mass. 183.

(e) *Prichard v. Lang*, 5 T. L. R. 639. This case is like *Bolch v. Smith*, 7 H. & N. 737.

(f) *Woods v. Carion Iron Co.*, 8 T. L. R. 376. Manholes constructed on the side of a roadway in a coal mine are parts of the ways of the mine: *Ferris v. Cowden Heath Coal Co., Ltd.*, 24 R. 615.

(g) *McMullen v. Newhouse Coal Co.*, 23 R. 759. See ante, 33.

(h) *Shepherd v. Molland Ry. Co.*, 25 L. T. (N. S.) 879.

Chap. VI. line; (a) so also was a man who stumbled over a humpier placed at the side of the line some distance from the platform, where it was the practice for arriving passengers to walk alongside and round the end of the train in order to cross the line. (b) So, too, where injuries were caused by combined defective construction of railway carriage, darkness of the station and a depression, the result of wear in the surface of a platform, a right of action was held to exist. (c) But there was held to be no right of action where a man caught his foot against the raised edge of a weighing-machine on a railway station platform. (d) nor where one fell down a staircase having stairs edged with brass which had worn smooth. (e)

McCarthy v. British Shipowners' Company

A man working on board ship fell down an open hatchway. It was held that, in the circumstances, thus leaving the hatchway open was not negligence, and if it was, it was the negligence of a fellow-servant. (/)

(a) *Longmore v. G. W. Ry. Co.*, 11 C. B. (N. S.) 184

(b) *Nicholson v. Lancs. & Y. Ry. Co.*, 31 L. J. Ex. 81

(c) *Stewart v. Cabotman Ry. Co.*, 8 Macph. 486

(d) *Comman v. Eastern Counties Ry. Co.*, 1 H. & N. 781

(e) *Crafter v. Metropolitan Ry. Co.*, 1 B. & C. P. 301. In the evidence stress would be laid on the evidence (at p. 301) that "the edge of each step had by constant traffic been worn smooth," which now to the eye seems to have been noticed.

(/) *McCarthy v. British Shipowners' Co.*, 10 L. R. 481. Cp. *O'Neill v. Everett*, 61 L. J. Q. B. 153; *Forsyth v. Rimmale*, 18 R. 21; *Jameson v. Russell*, 19 B. 388; and *Laender v. London and East and West India Docks Joint Committee*, 65 L. T. 474. In *Stidde v. Diamond Glass Co.*, 26 Ont. R. 270, a public street in a defective condition, used by an employer in connection with his business, is not a "way used in the business of the employer" within the meaning of the Ontario Workmen's Compensation for Injuries Act, 1902, but a plank placed to pry up a part of the flooring of a building partly erected is within the same words of the same Act: *Caldwell v. Mills*, 24 Ont. R. 462. See also *Headford v. McClary Manufacturing Co.*, 22 Ont. A. R. 164. *McInulty v. Primrose*, 24 R. 112, is the case of an accident caused by the breaking of a step in an unfinished house while a labourer was carrying a load of bricks up the stairs. It was held that there was no right of action under s. 1, sub-s. 1 of the Employers Liability Act, 1880.

Lord Watson in *Smith v. Baker* (b) refers to the "works" dangerous arrangement of machinery and tackle in that case as constituting a defect in the condition of the "works," and the phrase may be taken as covering the method of and the appliances for working. It has also been decided that an arrangement of machinery not in itself defective, but placed in the hands of unskilled laborers, must be regarded in connection with any obvious danger likely to arise from their use of it; and in the absence, in the condition of the machinery taken as a whole, of any sufficient safeguard against probable and obvious danger there is a defect (c).

A builder was engaged in pulling down an old house. After the roof had been removed and part of the walls pulled down, he ordered the plaintiff, a laborer in his employment, to remove some of the *debris* of the roof, which lay on the ground near one of the walls which was left standing. Owing to the neglect of the defendant the wall fell on the plaintiff as he worked. It was argued that the injury was not caused through a defect in the condition of works, since works signify those which are on an employer's own premises, where he permanently carries on his business; and further that works, as applied to a building, means a complete structure. The Court, however, held that the insecurity of the wall was a defect in the condition of the works. "I cannot see," said Wright, J., (d) "why premises which are in the possession of a person for the purposes of his business should not be regarded as the

Brannigan v. Robinson.

(a) *Id.*, 124.

(b) [1891] A. C. 854.

(c) *Stanton v. Scrutton*, 62 L. J. Q. B. 405.

(d) *Brannigan v. Robinson*, [1892] 1 Q. B. 844 at 347.

Chap. VI. works of such person, so long as he is carrying on his business there."

Moore v Gimson

In another case (a) certain buildings forming part of the defendant's works had been destroyed by fire, and the walls which remained standing after the fire were in a dangerous condition. A contractor who had the sole control of the work of reinstatement was employed to rebuild. The foreman's attention being called to the matter, and the walls being apparently dangerous, he withdrew the workmen and apprised the contractor. The contractor shored up the wall and left it safe, and certified the foreman to that effect. The workmen were then placed on the work again. Shortly after the wall fell and plaintiff was injured. The jury in the County Court found for the plaintiff. The evidence of negligence relied on was that when the foreman had the assurance of the contractor that the wall was safe he was satisfied with it, and never went to look at the wall with his own eyes. The Divisional Court set the judgment in the County Court aside, and entered judgment for the defendant, on the ground that there was no evidence of negligence. The contractor, who was not sued, was clearly liable. The foreman, who went to the best person he could to remedy the defect so soon as it was discovered, had "done all a man could do for the safety of the workmen." (b)

Booker v Higgs.

Booker v Higgs (c) is the case of a man engaged to pick a hole in a wall which, while he was doing so, came down upon him. The Divisional Court held that there was no liability on the employer; "if it were negligence to direct a man to do work more or less dangerous, it would be impossible to do such work."

(a) *Moore v Gimson*, 54 L. J. Q. B. 169.

(b) *Per Hawkins, J.*, *l.c.* at 170.

(c) 3 T. L. R. 618.

Machinery. (a)

Chap. VI.

The cases on defects in the condition of machinery have ^{defect in the condition of machinery.} already incidentally been treated.

A machine has been defined to include "every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result."^(b) It is defective in its condition if it is not in a proper condition for the purpose for which it is applied ^{Machine.} (c) This is well illustrated in the Scotch case of *Johnson v. Mitchell*,^(d) which was an action to recover damages for injuries sustained by crushing a hand while shutting a sliding door on the occasion of an alarm of fire. It was proved that the door was constructed for the purpose of preventing fire communication from one room to another, and that, when hastily closed, it would run on till brought up by the handle. The Court held the plaintiff entitled to recover, on the ground that the door, if shut quietly and deliberately, could hurt no one, and if plaintiff had looked to see how the door shut there would have been no chance of danger: yet, as the door was intended to be used on the occasion of a sudden fire, when people act very hurriedly, its construction was not suitable for the purpose for which it was to be applied.

In *Baron v. Dawes* ^{distinction between defect in the condition of a machine and defective result in working.} (e) a difference was relied on between a defect in the condition of a machine and a defective

(a) *Ante* 121

(b) *Conington v. Burdon*, 15 How (U.S.) 267

(c) *Paley v. Garnett*, 16 Q. B. D. 52; *Cp. Walsh v. Whiteley*, 21 Q. B. D. 371; *Baxter v. Wymau*, 4 T. L. R. 255. Where the evidence showed that a machine was the one in general use, it was held that its particular construction was not a defect. *Claxton v. Mowlem*, 4 T. L. R. 756; *Race v. Harrison*, 9 T. L. R. 667, 10 T. L. R. 92 (C. A.); *Gill v. Thornycroft*, 10 T. L. R. 816. *Ante*, 19 and 84

(d) 22 Sc. L. R. 698.

(e) 3 T. L. R. 557.

Chap. VI. result in working caused by the negligence of the man in charge of it. This may well be. In the case in question, however, the evidence pointed to a defect in the machine itself, which was held to be within the Act. The jury found that the injury was caused by defective pressure in the machine; and their finding was held to warrant a verdict for the plaintiff.

Defect in the condition of plant.

In a Canadian case (*a*) want of a guard to a saw was held not a defect in the condition of a saw, "when such guard was no part of the saw, nor of the machinery connected therewith, nor at all necessary for any proper or reasonable fitness of the saw for the purpose for which it was used." But Lords Coleridge and Esher, sitting as a Divisional Court, are reported to have said, in *Morgan v. Hutchins*, (*b*) a case which has already been noticed, that all the judges in *Walsh v. Whiteley* agreed in holding "that danger is a defect (*c*) within the Employers Liability Act; and to have held that a liability arose where a machine was not defective with reference to its purpose if it was so with reference to the danger arising from its use. The scope of this decision must not, however, be extended beyond "dangerous machinery used by children or young persons," (*d*) despite expressions in the report in the Weekly Reporter which are apparently of a most general application. One of the material facts in it is that "the inspector

Morgan v. Hutchins.

(a) *Hamilton v. Groesbeck*, 19 Ont. R. 56, aff'd 18 Ont. A. R. 437, for the reason that the proximate cause of the injury was not the unguarded condition of the saw by which the plaintiff was hurt, but the fact that he tripped over a pile of staves, but cf. *Tato v. Latham*, [1897] 1 Q. B. 502.

(b) 38 W. R. 412; 6 T. L. R. 219.

(c) *Id.*, per Lord Coleridge, C. J., 413. "If the machine is dangerous to the man without whose assistance it cannot be worked, and that without any fault of his own, that is a defect in the condition of the machinery." "That was the opinion of all the judges in *Walsh v. Whiteley*," per Lord Esher, M. R., 418. *McIntosh v. Stewart*, 19 N. Z. L. R. 152, 156.

(d) 6 T. L. R. 219.

of factories had warned defendant against employing young persons" on the particular machinery there called in question. The probability, therefore, is that the decision turned on these special facts, and that the principle in *Walsh v. Whiteley* (a) is in no way involved in the decision; though the report in the Weekly Reporter makes the learned judges assert the decision in *Walsh v. Whiteley* to be the distinct contradictory of the reported judgment, which is that evidence of a machine being dangerous "does not make it defective in its condition, nor does it imply negligence in the employer if an accident happens." (b)

An employer must see that the machinery supplied is not faulty. Still, it is not enough to prove merely a breakdown and consequential injury, for this may be due to a latent defect, (c) as in *Milne v. Townsend*, (d) where a crane broke down through a latent defect in a band, in respect of which the master was held not to be liable.

Defective machinery may raise the presumption of negligence and throw the onus on the defendant; if he then proves that he bought the machine in the best market, and that there was no discoverable defect, he has rebutted the presumption (e)

An employer is not bound to keep up with the latest inventions in machinery. He is not compelled to discard an old machine to make room for a new invention (f) If

(a) 21 Q. B. D. 371

(b) *Ibid.*, 379

(c) See Chap. II Prop. VI N. ante 26

(d) 19 R. 830

(e) *Ovington v. M'Vicars*, 2 Macph. 1033, per Lord Neaves, at 1074; *op. Howson v. Barrett*, 4 T. L. R. 449

(f) *Race v. Harrison*, 9 T. L. R. 567, 10 T. L. R. 92, *Gill v. Thorneycroft*, 10 T. L. R. 316.

Chap. VI. his machine suffers deterioration from age and wear, he is in default, but not for continuing the use so long as he maintains the efficiency of it. (*a*)

Butler v. Birnbaum.

In *Butler v. Birnbaum*, (*b*) a man employed in the manufacture of waterproofs was cerebrally affected by the fumes of chemicals used. The defect in the condition of the machine alleged was that it was not protected in the same way in which some of the newest constructed machines were. The employer was held not liable.

Defect at common law.

Even at common law, where a machine is shown to be defective and injury is caused thereby to a workman, the employer is liable; since although the workman is held to take the risk of the negligence of his fellow-workman, he is only held to do this on the assumption that he will be furnished with proper instruments. (*c*)

Specific defect

If the accident can be traced to some specific defect in machinery, the employer is put to explain how the defect was allowed to continue. (*d*) If an examination is rendered impossible by the act of the person alleged to be in fault, the presumption that he is in fault, in the particular which cannot be investigated through his act, will be made against him. (*e*) Thus an accident having happened through a link in a chain giving way, and the foreman having thrown the broken link into a river so that no examination was

(*a*) *Hanson v. Lancs. & Y. Ry. Co.*, 30 W. R. 297, *Wise v. Aberdeen Harbour Commissioners*, 11 R. 115.

(*b*) 7 T. L. R. 287, *cp. Milligan v. Mun.*, 19 R. 18, observed on in *Cameron v. Walker*, 35 R. L. R. 347.

(*c*) Prop. VI., Chapter II., *ante*, 26. In *Woods v. Matheson*, 4 Macq. (H. L. Sc.) 215 at 227, Lord Wensleydale said: "I take it to be perfectly clear that in these cases there is no warranty, all that the master is bound to do is to provide machinery fit and proper for the work, and to take care to have it superintended by himself or by his workmen in a fit and proper manner."

(*d*) *Woods v. Matheson*, 4 Macq. (H. L. Sc.) 215.

(*e*) *Ovington v. M'Vicars*, 2 Macph. 1066.

possible, the presumption was made against the employer **Chap. VI.**
that the link was so bad as not to bear examination. (a)

Two Scotch cases (b) have been considered (c) to go too far. In the former of these a workman engaged in attaching a lightning conductor to a chimney-stack was killed by the breaking of a rope by which he was suspended. No actual evidence was given as to the defect which caused the accident, though there was skilled evidence given that it might have been caused by a "nip" in the rope, i.e. by a defect which would have been detected on proper examination. No examination was made. In the latter of these two cases, *Walker v. Olsen*, a stevedore while unloading a vessel was injured by the tackling falling upon him. It was not shown what caused the falling of the tackling, but it was held that no satisfactory explanation being given by the owner led to the conclusion that the tackling was defective, and the owner liable for damages. Apart from possibly unguarded expressions, in the judgments of Lord Moncreiff these cases seem to accord with the authorities. In *Fraser v. Fraser* the duty to the workman was to examine the rope, and the failure to do so resulted in the accident. In *Walker v. Olsen* again, tackling being liable to get out of order, there was a duty of recurrent examination which was not performed. (d)

These cases in principle do not differ from *Murphy v. Co Phillips* (e) and *Webb v. Rennie*, (f) in the latter of which

(a) *Rooney v. Allan*, 10 R. 1224, Prop. XXIII Chap. III, ante, 81

(b) *Fraser v. Fraser*, 9 R. 896, *Walker v. Olsen*, 9 R. 916

(c) *Spens and Younger, Employers and Employed*, 46

(d) *Cp Macfarlane v. Thompson*, 12 R. 232

(e) 85 L. T. (N. S.) 477, distinguished in *Black v. Ontario Wheel Co.*, 19 Ont. R. 578, and in *Haurahan v. Ardnamalt Steamship Co.*, 22 L. R. Ir. 55

(f) 4 F. & F. 608 at 618.

Chap. VI. cases Cockburn, C.J., said it was the employer's "business to know if, by reasonable care and precaution, he could ascertain whether the apparatus or machinery were in a fit state or not." (a)

Cowley v. Mayor of Sunderland

In *Cowley v. Mayor of Sunderland*, (b) a machine originally made to work by hand, and made properly for that purpose, was adapted to work by steam. A rod necessary for working the machine by hand, but otherwise entirely useless, was left in the machine, projecting above the level. The condition of the machine was defective.

Machinery entrusted to unskilled labourers.

An arrangement of machinery, not in itself defective, but entrusted to unskilled labourers to manage, must be considered with regard to an obvious chance of danger arising through their want of care; and the absence, in the condition of the machinery taken as a whole, of any sufficient safeguard against danger from any ordinary and probable occurrence (*e.g.* a slip in the management of a winch) is a defect. (c)

Violation of Factory Acts

There may be a violation of the Factory and Workshop Act, 1901, (d) which may be treated as a defect in condition within the Employers Liability Act, 1880. This was discussed in the Ontario case of *Thomson v. Wright*, (e) where a failure to guard dangerous machinery within the provisions

(a) See Propositions IX-XIII, Chapter II, *ante*, 24. Cf. *Tally v. Ashton*, 1 Q. B. D. 314 at 319, and *Scott v. London and St. Katharine Docks Co.*, 3 H. & C. 596, see also *Huxam v. Thom*, *Law Times*, 21st January, 1882.

(b) 6 H. & N. 565.

(c) *Stanton v. Strutton*, 62 L. J. Q. B. 405.

(d) 1 Edw. VII., c. 22.

(e) 22 Ont. R. 127. *Ante*, 24. See *McClehorty v. Gale Manufacturing Co.*, per Osler, J.A., 19 Ont. App. 117. This is the case of a woman's hair caught by an unguarded revolving horizontal shaft which passed through the room near the ceiling, and in front of a window she was opening at the time of the accident. See *O'Connor v. Hamilton Bridge Co.*, 25 Ont. R. 12.

of the Ontario Factory Act was described as "*per se* Chap. VI. evidence of negligence."

In the Scotch decision of *Kelly v. Clabe Sugar Refining Company*, (a) the protection of the Factory Acts, 1878 to 1891, was held to extend to every one employed in the factory; so that there is no necessity to show that at the time of the happening of an accident the injured person should be actually engaged in the performance of his duty. This liability exists independently of the Employers Liability Act, 1880. (b) Lord Adam thus states it: "The owners of the factory are in fault for not having this shaft securely fenced, and are *prima facie* liable in damages for the consequences of that fault, for I cannot adopt the view that their liability is limited to the penalty imposed by the Statute for neglect of its provisions. I think that the neglect of the statutory provisions creates a *prima facie* case of fault against the factory owners, which will render them liable in damages to their *employees*, who may have been injured through their fault." (c)

Breach of some other statutory obligation or evidence of breach under the Employers Liability Act.

By the Factory and Workshop Act, 1901, (d) the expression "machinery" is to include any driving strap or band.

Plant (e)

To decide what is "plant" within the Act is a matter of more difficulty. Lindley, L.J., in *Yarmouth v. France* (f) says: "In its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business—not

(a) 20 R. 819.

(b) *Ante*, 25.

(c) See Proposition XIII, Chapter II, *ante*, 33.

(d) 1 Edw. VII., c. 23, s. 156.

(e) *Ante*, 124.

(f) 19 Q. B. D. 658.

Chap. VI. his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business." (a) The question arose in that case whether a horse was plant within the sub-section. On this the Lord Justice observes: "The word 'defect' and the words 'way and machinery' which occur in the section, throw some doubt on whether plant can include horses; but I do not think the doubt sufficient to require the Court to hold that plant cannot include horses, or to hold that plant must be confined to inanimate chattels. The defendant in this case has a number of horses for use in his business; they were part of his plant, not only in the ordinary sense of the word, but also, in my opinion, in the sense in which the word is used in sec. 1, sub-sec. 1, of the Employers Liability Act." The horse, being vicious, was held to be defective plant, as whatever renders plant unfit for the use for which it is intended, when used in a reasonable way, and with reasonable care, is a "defect" in the condition within the Act. Lord Esher, M.R., was of the same opinion. (b)

*Carter v.
Carrington*

One decision, (c) by which it is held that a ship belonging to a shipping company and carrying coals for coal merchants is the coal merchants' plant, appears to impose a non-natural strain on the word "plant;" which but slightly

(a) See *Blake v. Shaw*, Johns (Page Wood, V.C.), 7:12

(b) Per Lord Esher, M.R. The defendant "must use horses and carts or waggons. They are all necessary for the carrying on of the business. It cannot be contended that the carts and waggons are not 'plant.' Can it be said that the horses, without which the carts and waggons would be useless, are not?" This method of reasoning may be yet further extended; *e.g.* can it be said that drivers, without which horses and carts and waggons would be worse than useless—positively injurious—are not?

(c) 78 L. T. 76. Cp. *Simpson v. Paton*, 23 R. 590; *McLachlan v. Steamship "Plover" Co.*, 23 R. 753. It is also inconsistent with *Allmarch v. Walker*, 78 Law Times newspaper, 891, that says broadly that a defect in a cart hired temporarily to carry a load is not a defect in plant, but which is wrong if the principle in the text holds good.

extended would seem to cover the vehicle of the carrier **Chap. VI.** where goods are delivered at the risk of the consignor

In the Scotch case of *Haston v. Edinburgh Street Tramway Co.* (a) the sheriff held that the word "plant" includes animals used for the purpose of a business. When the case came before the Court there appears to have been no argument on the point, and Lord Young took it as indisputable that horses are plant within the Act, so that permitting a horse unfit to be used to continue at work is conduct that makes an employer liable for a defect in the condition of his plant. In the Victorian case of *Monahan v. Moore*, (b) "a rope, horse and bucket connected together and used to lower cement down a sewage shaft" were held "plant," and an insecure fastening of them a "defect."

Perry v. Brass (c) has been cited for the proposition that the workman cannot recover in respect of defective plant unless the plant belongs to the employer. The case does not go so far as this; but even to the length that it does, it is scarcely (as reported) in accord with good sense. Defendants were employed by Government to do repairs to Government buildings. Plaintiff was in their employ under a foreman, to whom he applied for a ladder and was referred by his foreman to the Government foreman of the works. He told plaintiff he might have one which he indicated, and which plaintiff fetched. It was defective, broke as soon as used, and caused injury to plaintiff. The Divisional Court held that "the ladder was not the defendants', so that the accident did not arise from any defect in plant of theirs," and as to "their duty to see that it was safe there was no evidence of negligence." The

(a) 11 R. 621. Cp. *Fraser v. Hood*, 15 R. 178.

(b) 23 V. L. R. 230.

(c) 5 T. L. R. 257. Cp. *Russell v. M'Leish*, 35 Sc. L. R. 818. *Ante*, 22. *Post*, 188.

Chap. VI. question of the title to the plant actually used with the sanction of the employer would appear irrelevant. When the foreman authorizes the workman to apply in a certain quarter for the plant necessary for the work, and which the employer is bound to supply, and the plant supplied breaks in using in a way that it ought not if the employer had done his duty, a case of *res ipsa loquitur* appears to present itself. (a) The principle at the bottom of *Jones v. Burford* (b) is very different. A ladder was borrowed and used without the knowledge or authority of the employer or his foreman, and proved defective and caused injury. The ownership of the defective instrument is in itself immaterial. The user in the business with the sanction of the employer is what is to be looked at. This seems to be the correct principle to refer to. (c)

Jones v. Burford.

Carcase of house.

The carcase of a house cannot be said to be builder's plant; (d) and is plainly not included in Landley, L.J.'s description quoted above, though it appears to come within the words "works connected with or used in the business of the employer." (e)

Ship.

A ship, we have just seen, belonging to a shipping company, and carrying coals for coal merchants between Cardiff and Newhaven, was held "plant" in the coal merchants' business. (f)

Ladder accident through high-heeled boots.

A girl fell down a ladder and was injured. The accident

(a) *Webb v. Rennie*, 4 F. & P. 608; *Manney v. Scott*, [1899] 1 Q. B. 986; as to the authority of this case on the duty of examination, *ante*, 53.

(b) 1 T. L. R. 137, *Watson v. McLosh*, 25 R. 1028.

(c) *Conghin v. Gibson*, [1899] 1 Q. B. 115, states the obligation where plant is gratuitously lent.

(d) *Conway v. Clements*, 2 T. L. R. 80, per *Mannix, J.*, *Reynolds v. Holloway*, 14 T. L. R. 551.

(e) *Brannigan v. Robinson*, [1892] 1 Q. B. 844.

(f) *Carter v. Clarke*, 14 T. L. R. 172. The report of the case is not clear, and the decision may probably be sustained on one of the other

as caused through the girl wearing high-heeled boots. Chap. VI.
She was consequently disentitled to recover (a)

A washerwoman fell down a trap door, through which ^{Manifest danger}
was a ladder used for passing from one floor to another.
Lord Macleay considered that "the question of known
hunger is raised. One class [of cases] is where the master,
by the adoption of some known and suitable appliance, may
diminish the danger to his servants and does not adopt it; in
such cases the rules of the Statute as to injuries resulting
from defects will probably apply, but the other class is
where the danger is one which is perfectly in the power of
the servant to guard himself against simply by keeping his
eyes open. That is the typical case in which the law says
the servant must take the consequences of his own
neglect" (b)

Having car buffers of different heights so that, in
coupling, the buffers overlap, is "a defect in the arrange-
ment of the plant," within the Ontario Workmen's Com-
pensation for Injuries Act. (c)

A driving band which had a habit of slipping when ^{va}
the machine was used, has been held defective plant; (d)
so has a temporary staging of loose planks, one of which
shifted when stepped on; (e) and the roller of a jute

points taken. On the point for which the case is mentioned here it is
probably one of those cases which are said to be "decided on their par-
ticular facts, and which lay down no principle of law." See *Sandeman v.*
Scott, 11 R. 2 (2 B. 86), *Cottonwool Manufacture von Sehelder v. Gohlstedt*,
[1893] A. C. 8, *Sung-on v. Paton*, 21 R. 590, and *M. Lachlan v. Steamship*
"Peveril" Co., Ltd., 21 R. 751, hold that there is no duty on a stevedore
to inspect a vessel he is unloading in order to see to its safety for his
servants.

(a) *Ayre v. Bull*, 5 T. L. R. 202.

(b) *Moore v. Ross*, 17 R. 796. See Propositions XVI-XVIII, Chapter II.,
ante, 37.

(c) *Bond v. Toronto Ry. Co.*, 22 Ont. A. R. 73, *cp. Ellisbury v. N. Y. N. H.*
& H. Rd. Co., 172 Mass. 130.

(d) *Baxter v. Wyman*, 4 T. L. R. 265.

(e) *Giles v. Thames Ironworks Co.*, 1 T. L. R. 469.

Chap. VI. cutting machine which allowed the jute being cut to get into the joints of the various sections of which it was composed; (a) a hydraulic crane which jerked as it was used; (b) unfenced machinery; (c) but a failure to pack iron stanchions so that they did not fall from the trolley on which they were being carried, has been held not a defect in the plant. (d)

Injury must be
"caused" by the
defect

Lastly, the injury must be "caused" by the defect, for it is not enough that a defect exists in some particular, and that injury from the works, ways, etc., occurs subsequently to the existence of the defect. The relation of cause and effect in natural and ordinary sequence is necessary before a liability on the part of the master can be established. (e)

The workman cannot recover if the occurrence causing the injury is pure accident; (f) nor if any appliance fails under some unexpectedly severe strain; (g) nor if the negligence is the work of a fellow-servant not in the exercise of superintendence. The fact that a defect existed in machinery, which the plaintiff had been told off to remedy, has been held not the proximate cause of an injury received by him through a fellow-servant negligently setting machinery in motion while plaintiff was about the work. (h)

(a) *Paley v. Garnett*, 15 Q. B. D. 52

(b) *Bacon v. Gray, Davies & Co.*, 3 T. L. R. 557

(c) *Hes. v. Abraham Welsh Flannel Co.*, 2 T. L. R. 547.

(d) *Corcoran v. East Surrey Ironworks Co.*, 58 L. J. Q. B. 115

(e) *Marlin v. Connah's Quay Alkali Co.*, 33 W. R. 216. Mr. Labatt discusses "the necessity of establishing a causal connection between the order and the injury," *Master and Servant*, 2019-2024

(f) *Harris v. Timm*, 5 T. L. R. 221; *McMann v. Hay*, 9 R. 425, *Welch v. Grace*, 167 Mass. 590

(g) *McLean v. Cole*, 175 Mass. 5. A scaffold swung so violently as to swing a workman out, through a gutter wrenched from a building coming off unexpectedly easily.

(h) *Mackay v. Watson*, 24 R. 383; *Mulligan v. McAlpine*, 15 R. 789.

Holmes, J., (a) in discussing what is a "defect in the condition," etc., says that the words imply that "the defect must be one which the employer has a right to remedy if he discovers it, and of a kind which it is possible to charge a servant with the duty of setting right;" that is, the master is not to be put to inquire as to things not under his own control (b). Thus the defective condition of a way used in connection with the employer's business, but not under his control—an unfenced road at the top of a steep hill leading to the employer's premises—carries with it no liability. (c) In this case Lloyd, Ct., held that the meaning of the words of the Act he was construing "defect in the condition of a way used in the business—" means some defect on his premises, or on a place over which he had control, that could be made right by the employer"—adopting in substance Holmes, J.'s construction (d).

Defect must be one that the employer has a right to remedy

Mathew, J., (e) has held "that the Legislature in saying 'defects in the condition of the . . . works . . . connected with or used in the business of the employer,' did not mean 'about to be connected,' or 'about to be used.' I think the defect that it was intended to protect the workman against was a defect in the works connected with or used in the business of the employer, carried on by himself, a defect which the employer might or ought to discover, and the workman ought to have an opportunity of objecting to. I do not think sec. 1, sub-sec. 1 was intended to apply to

Defect must be connected with or used in the business

(a) *Engel v. New York, Providence and Boston Ry. Co.*, 160 Mass. 200, 261.

(b) *Hughes v. Malden, & C., Gas Light Co.*, 163 Mass. 335.

(c) *Stride v. Diamond Glass Co.*, 26 Ont. R. 270.

(d) *Robinson v. Watson*, 20 It. 144, is on the same lines, and not apparently reconcilable with the doctrine of *Carter v. Clarke*, 78 L. T. 76. Cp. *Nelson v. Scott*, 19 R. 425.

(e) *Howe v. Finch*, 17 Q. B. D. 187 at 189.

Chap. VI. the case where machinery, etc., was brought into a place intended to be used and left so insecure that it fell."

Mr Spens' comment.

Mr. Spens (*a*) considers that "the Scotch Courts would be disposed to give a much more liberal construction to the word 'connected' in the phrase 'connected with the business of the employer' The word 'connected,' I apprehend, would be interpreted as meaning having something to do with the business of the employer, and the wall which fell in *Howe's* case having been put up for the purpose of the business would, in my opinion, fall within that interpretation."

Wright, J.'s opinion in *Bramagan v. Robinson*.

Wright, J., (*b*) "cannot see why premises which are in the possession of a person for the purposes of his business should not be regarded as the works of such person so long as he is carrying on his business there. The case of *Howe v. Finch* (*c*) is not in any way inconsistent with our judgment; for in that case the employer who was sued was not the owner of the premises, and the wall being still in an unfinished state and in the possession of the builder at the time of the accident could not have been said to be connected with or used in the business of the employer."

In *Howe v. Finch* (*d*) the plaintiff was employed at chemical works. A wall in course of building fell on him. This incomplete wall, in Wright, J.'s judgment, was connected with the business of the builder, but not with the chemical works.

Biddle v. Hart.

Biddle v. Hart (*e*) is a confirmation of Wright, J.'s view.

(*a*) Spens and Younger, *Employers and Employed*, 205.

(*b*) *Bramagan v. Robinson*, [1892] 1 Q. B. 344 at 347, *cp Nordheimer v. Alexander*, 19 Can S. C. R. 218, the case of a wall left in a dangerous condition and blowing down.

(*c*) 17 Q. B. 11, 187.

(*d*) *Supra*.

(*e*) [1907] 1 K. B. 649, *Coughlin v. Gillison*, [1893] 1 Q. B. 145. *Ante*

The question of the ownership of tackle used in a business is not material in the consideration whether it is plant and whether the employer has a duty with regard to it. The Court of Appeal there declined to affirm the proposition that "any one who uses tackle which is not his own in the sense that it has either been purchased or hired by him, that is gratuitously lent to him, is not bound to take reasonable care to see that the tackle is in a proper condition." In whomsoever the property in the tackle may be, the employer "has to take reasonable care that the tackle is reasonably fit for the purpose." In the Court of Appeal the tackle appears to have been assumed to be plant; in the Divisional Court to have been an integral portion of the ship, hence non-congruent conclusions.

Chap. VI.
Ownership of
tackle used in a
business as
incidental

Thompson v. City Glass Bottle Co. (a) is a decision where the judgments of the Court of Appeal, however legally authoritative, seem to lack logical cogency. A machine broke down, an order was given that it should "not be used again," and a "new machine had been ordered." The day following the breakdown— a Sunday— the workmen were removing the machine to make ready apparently for the work next day, when the broken part fell on the plaintiff's toe and injured him. The County Court judge found that the machine "had finally ceased to be used in the defendants' business," yet that it still remained "plant." The Divisional Court held that the words "plant connected with or used in the business of the employer" had no "reference to things which have ceased to be so connected or used." The Court of Appeal reversed this, (b) *Collins, M.R.* saying: "In the first place he [the County Court judge] decided that the machine was,

*Thompson v.
City Glass
Bottle Co.*

(a) [1901] 2 K. B. 489.

(b) [1902] 1 K. B. 283.

Chap. VI. though in a defective condition, plant connected with or used in the employer's business." (a) "On the question whether there was any evidence on which the judge could find that the machine was plant, we have the fact that it was in such physical contiguity to the rest of the plant that it had to be removed out of the way under the orders of the foreman. There was no evidence so far as I can see of an absence of intention to mend the machine, (b) and it could not be contended that the mere fact of its being out of repair caused it to cease to be plant. (c) The words of the section 'used in the business of the employer' do not, in my opinion, mean that the plant must be in use at the moment when the injury occurs to the workman, and a machine does not cease to be plant in the interval between the giving an order that it shall be repaired and the completion of the repair." (d) Stirling, L.J., observes: "The evidence seems to show that the machine had ceased to be used in the business." This seems inconsistent with Collins, M.L.'s remark. He adds, "The question arises whether it had ceased to be connected with the business." The evidence on which the Court of Appeal hold that it

(a) At 234 the report states that the County Court judge found that the machine "had finally ceased to be used in the defendant's business."

(b) If there had been, the evidence would have been irrelevant, since the severing from the business was found by the County Court judge to be final. *Supra*.

(c) No suggestion of so futile a contention anywhere appears in the report. The syllogism the M.L. appears eager to refute seems something as follows: Machinery out of repair (i.e. defective) is not defective plant. The injury was caused by machinery out of repair. Therefore the injury was not caused by defective plant. The actual contention that he does not touch is, machinery that had "finally ceased to be used in the business," and which causes injury while the business is not being carried on, is not machinery connected with the business. Is a partner who has finally severed his interest in his late firm still "connected with" it? The case really turns on the meaning attributable to this last phrase.

(d) It should be noted that the circumstances assumed in this passage have a very distant, if any, resemblance to the facts of the case before the Court.

had not seems to be that it was physically where it might Chap. VI.
be expected to be, if it were plant. (c)

In this connection we must take sub-sec. 3 of sect. 2, (b) ^{Knowledge}
which provides that the workman shall not be entitled to
recover where he knew of the defect (c) or negligence (for
the sub-section is of general application and is to be read
into all the provisions of the Act) which caused the injury,
and did not within a reasonable time (d) give, or cause to be

(a) *Mr. Liddell, Master and Servant, 195, 1961* after reciting the
cases on the words "connected with or used in the business of," says of
Thompson v. City Glass Bottle Co. "It is manifest that this ruling throws
considerable doubt upon many of the cases cited in the last two sub-
sections." The correctness of this proposition may also with probability be advanced.

(b) *Idib, 126*

(c) In *Barrett v. Great Western Cotton Co., L.R. 7 P.C. 130*, it was said
that men's knowledge of a defect does not bar the servant's claim. There
must be knowledge of the defect and consent on the defect. *Idib, 126.*

(d) "A reasonable time" is a matter dependent upon the particular facts,
and variable according to circumstances. *Washburn & Morn v. Patterson,*
29 Ch. D. 1. See *Strood, Judicial Dictionary, sub voce Reasonable.*

"The determination of what is reasonable time may be rather a
question of law or a question of fact, or a mixed question of law and fact
(*Taxlot, Evid., s. 349*)

The Sale of Goods Act, 1893 (36 & 37 Vict. c. 54, s. 36), provides that
so far as the matters dealt with in this Act are concerned, reasonable time
is a matter of fact.

"I should observe," said Lord Herschell, P. (*Hobbs v. Raymond and
Reid, [1893] A.C. 22 at 29*), discussing obligations under a bill of lading,
"that there is of course no such thing as a reasonable time in the abstract.
It must always depend upon circumstances." Lord Ashbourne adds (*Id.*
at 34). "What is the meaning of this expression 'reasonable time'? It is
obvious that 'reasonable' cannot mean a definite and fixed time. It would
not be 'reasonable' if it was not sufficiently elastic to allow the considera-
tion of circumstances, which all reason would require to be taken into
account."

Three months have been held (*Washburn and Morn Manufacturing
Co. v. Patterson, 29 Ch. D. 48*) more than a reasonable time for giving
security for the costs of an appeal, where an application was made to
dismiss the appeal for want of prosecution on default for three months
to give security within a reasonable time. The rule was laid down
in these words: "We think that in general three months must be con-
sidered more than a reasonable time. Therefore in future, when three
months, or what the Court may consider a reasonable time, have elapsed
without security being given, an order will be made for immediate dis-
missal of the appeal, unless there are extenuating circumstances, in which
case the Court will take those circumstances into consideration, and if they
are sufficient will fix a further time. We do not lay it down as a rule that
less than three months will in no case be sufficient, but only that an
unexplained delay of three months is sufficient."

No rule can certainly be laid down to determine what is a reasonable

Chap. VI. given, information, either to the employer or to some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the defect or negligence.

**Statutory
defence.**

This has been described by Smith, J., (a) as a "statutory defence," "which theretofore did not exist." Its effect is twofold: First, the workman who knows of a defect or negligence has a reasonable time in which to communicate it to the master or his representative under the section. If, before the "reasonable time" is elapsed, an injury happens, the workman has his right of action unaffected. If the "reasonable time" is elapsed, and no notice is given, then the presumption that the workman takes the risk is raised. This is probably no more than the expression of the workman's right at common law, on the assumption that the defect is not plain and patent at the time when he enters the service. (b) Secondly, where the workman knows that the employer or the superior has already knowledge of the defect or negligence, he is not bound to renew information of it. At common law in this case his acquiescence will be evidence of an acceptance of the risk, unless we have, whether explicitly or implicitly, the master's assurance that the defect shall be remedied. (c)

**Contributory
negligence.**

The defence of contributory negligence is not affected by this section, (d) which must be construed as limiting and not as extending the employer's liability. (e) Consequently,

time within which a workman, in proceeding under the Employers Liability Act, 1880, is to give information beyond this—that the actual circumstances of each case must be considered, and the conclusion arrived at must be in accordance with the particular facts that then appear.

(a) *Webb v. Ballant*, 17 Q. B. D. 125.

(b) *Eureka Co. v. Bass*, 60 Am. R. 152.

(c) *Holmes v. Worthington*, 2 F. & F. 573.

(d) *Stuart v. Evans*, 81 W. R. 706. *Ante*, 85.

(e) *Thomas v. Quartermaine*, 18 Q. B. D., per Bowen, L. J., 693; per Fry, L. J., 708; *Ayres v. Bull*, 5 T. L. R. 202.

it does not affect the conditions in which the rule expressed **Chap. VI.** by the maxim *Volenti non fit injuria* is invoked. (a) It appears rather to specify certain requisites—viz, failure to communicate defects or negligence to the master, the proof of which will exonerate the master from liability, even though at common law similar proof would not be sufficient.

Though the defences of contributory negligence, (b) and of *volenti non fit injuria*, are both open to the employer ^{Contributory negligence and *Volenti non fit injuria*.} under the Act, (c) when the workman's "acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it unless he knew of its existence, and appreciated or had the means of appreciating its danger. But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case" (d).

At common law, if the workman gave notice to the ^{Common law liability—} employer of a defect or negligence in the system of working, and subsequently sustained injury therefrom, in circumstances that negatived the presumption that he undertook the risk, the workman would be entitled to recover in respect of the same. If, however, he continued working in

(a) *Ante*, 97

(b) *Stuart v Evans*, 31 W. R. 706, see Chapter IV, *ante*, 85

(c) *Thomas v. Quartermaine*, 14 Q. B. D. 685, see Prop. XI, Chapter II, *ante*, 31

(d) Per Lord Watson, *Smith v. Baker*, [1891] A. C. 325 at 355. The outcome of this doctrine is seen in *Medway v. Greenwich Inland Linoleum Co., Ltd.*, 14 T. L. R. 291, or perhaps better in *Williams v. Birmingham Battery and Metal Co.*, [1899] 2 Q. B. 338 at 345. *Ante*, 29. *Webster v. Foley*, 21 Can. S. C. 580.

Chap. VI. face of the risk, knowing that the employer was acquainted with the existence of it, he would be unable to recover in respect of injuries sustained by him. ^(a) And if he gave notice of the defect or negligence but only to a foreman and not to his employer personally, he would still be disentitled to recover. ^(b)

Effect of the
sub-section

By sub-sec. 3, sec. 2, the workman is safeguarded—

- (1) If he informs his employer;
- (2) If he informs some person superior to himself in the employment;
- (3) If he knew that his employer or some person superior to himself in the service of the employer already knew of the defect or negligence, and, knowing this, did not communicate with them.

Notice, to whom
given.

It is to be noted that the notice may be given by the workman to "some person superior to himself in the service of the employer." This phrase is not limited to a person in superintendence under sub-sec. 2 of sec. 1; nor yet to a person to whose orders the workman is bound to conform under sub-sec. 3 of sec. 1. It must include any person of superior grade about the same works with the injured workman, even though he is ordinarily engaged in manual labour. The words "superior to himself in the service of the employer" imply gradation in the same department of work. Thus it would not be sufficient for a bricklayer's labourer to give information of defect or negligence to a foreman of carpenters not concerned with the work as to which the defect or negligence is reported. The superiority must be "in the service of the employer," not a superiority of employment merely; but there must exist a relation

(a) *Griffiths v London and St Katharine Docks Co.*, 13 Q B D. 259. See Propositions XII., XVI., and XVII., Chapter II., ante, 82, 87, and 88.

(b) *Senior v. Ward*, 1 E. & E. 385.

between the person complaining and the person complained Chap. VI.
to, and a relevance of the complaint to the business of —
each.

There does not appear to have been any decision as to ^{El} ~~sub-section~~
what amount of knowledge of the employer or the superior
would be sufficient to exonerate the workman "who has
failed within a reasonable time to give or cause to be given
information" of defect or negligence known to him to his
employer. The matter cannot be taken from the jury, and
the fertility of their excuses for the injured man, whatever
his conduct in this respect, may never be exhausted.
Knowledge has been distinguished from notice; (a) and
in the present case it is manifest that something much
less than notice would be sufficient to satisfy the require-
ments of the sub-section. As it is the duty of the employer
to remedy defects and to maintain his plant and machinery
in a condition of efficiency, any information which should
suggest inquiry or would make it the employer's duty to
inquire—constructive and not actual knowledge—would
seem to be sufficient to bring a workman within the pro-
tection of these words. The analogy, an imperfect one
though, of the bills of exchange cases, may be suggested
under which it has been decided that notice and knowledge
meant "not merely express notice, but knowledge or the
means of knowledge to which the party wilfully shuts his
eyes—a suspicion in the mind of the party and the means
of knowledge in his power wilfully disregarded." (b) The
workman, we have seen, (c) is to be in the same position as
a licensee on business on the premises of the employer.

(a) Per Alderson, 17, *Burgh v. Legge*, 5 M. & W. 418 at 422. Per Lord
Blackburn, *Middie v. Maspens*, 11 App. Cas. 871 at 885. See per Lord
Selborne at 888. As to knowledge, see *ante*, 80.

(b) *May v. Chapman*, 16 M. & W. 355, *Raphael v. Bank of England*, 17
Q. B. 161.

(c) *Ante*, 136.

Chap. VI. Now, the position of a licensee is that he can charge the occupier of premises if the occupier "discovers the defect and does not cure it, or if he did not discover what he ought on investigation to have discovered," (a) or, to alter the phraseology, which he ought to have investigated and then ought to have discovered.

Webb v. Ballard.

Webb v. Ballard (b) favours this view. Deceased was a fireman in defendants' brewery. To reach a valve in a pipe near the ceiling a ladder was used. Thus, through a peculiarity in the construction of the premises, had to rest against a bend in the pipe beneath that containing the valve; and on this account it could not rest upon it securely. The ladder had been used for two years, and had no hooks or stays whereby it could be steadied. Deceased was found dead at the bottom of the ladder. It was suggested that the ladder had slipped while he was on it, and thereby caused his head to strike against a fly-wheel. The county court judge found for the plaintiff, saying that the ladder, placed as it was, "was manifestly a most dangerous method of getting at the upper valve, and, therefore, an unsafe way or portion of the defendants' plant, and for which the defendants and their manager, who were constantly on the premises, must be held responsible." It was argued that the statutory defence was established, since there was no evidence that the employer knew of the risk, and the deceased should therefore have given notice. The Court, however, held that "there was evidence upon which the learned County Court judge could, if he had been so minded, find that the plaintiff [? the deceased] was aware that the defendant knew of the defect." Since there was no pretence even of evidence of any direct

(a) Per Blackburn, J., *Tarry v. Ashton*, 1 Q. B. D. 314 at 319.

(b) 17 Q. B. D. 192.

communicated information, it is plain that in the opinion of the Court inferential knowledge—knowledge presumed from the general condition of things—is sufficient. Chap. VI

II NEGLIGENCE IS SUPERINTENDENCE

Secondly, the workman is to be in the same position as a licensee (a) where he is injured "by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence" (b). The definition clause limits those having superintendence, which entails chargeability of the master, to persons whose sole or principal duty is that of superintendence, and who are not ordinarily engaged in manual labour (c).

The negligence must also be (1) that of a person whose principal duty is superintendence, and (2) must be negligence while in the exercise of the superintendence. Thus, as to the first requisite, in *Kellard v. Rooke*, (d) the injury was caused through the foreman of a gang of labourers, who was working with them, not giving sufficient warning of the coming of a bale of goods which the gang was engaged in packing, so that the plaintiff was injured. The plaintiff was held disentitled to recover, because a gangster, the foreman of a gang of labourers, who is working with his hands all the day, is ordinarily engaged in manual labour, and so not a superintendent within the Act.

(a) *Ante*, 136. *Post*, 292.

(b) § 1, sub-s 2. *Ante*, 124. In the Ontario, British Columbia, and Manitoba Acts the definition runs "superintendence shall be construed as meaning such general superintendence over workmen as is exercised by a foreman, or person in a like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labour."

(c) S. 8.

(d) 19 Q. B. D. 585, 21 Q. B. D. 367.

Chap. VI.

*Wright v
Wallis.*

In this case *Wright v. Wallis*^(a) was mentioned, in which the Court of Appeal, apparently sitting as a Divisional Court, set aside a nonsuit by the County Court judge where a plaintiff was injured by iron thrown into a barge by a person, according to the evidence of the plaintiff, "at work on the stage, and giving all orders at the time of the accident." The Court set aside the nonsuit without reference to the fact of the person giving the order being ordinarily engaged in manual labour or not; and possibly because the injury was by reason of the act of a person to whose orders the workman at the time of the injury was bound to conform and did conform, and in consequence of which conformity the accident happened; since Lord Esher, M.R., said: An argument addressed to the Court was "that if you ordered a man to stand in a certain place, and then threw something at him and injured him, the injury was not caused by his conforming to the order, but solely by the subsequent act." Lindley, J.J., however, who was a member of the Court in *Wright v. Wallis*, in *Kellard v. Brooke*^(b) explains that decision to have been, that there was not sufficient evidence to show what was the real position of the person whose negligence caused the injury, and as the Court had not the materials to decide it, they sent the case down for further investigation.

*Shaffers v.
General Steam
Navigation Co.*

On the second point, *Shaffers v. General Steam Navigation Co* ^(c) may be referred to. The plaintiff was employed with other workmen in loading corn on board a ship, and, at the time of the accident, was in the hold stowing away the sacks as they were lowered by means of a steam crane. To control the motions of the crane there was a "guy-rope" fastened to it, in charge of a man whose duty it was to

(a) 3 T. L. R. 779 (C. A.).

(b) 21 Q. B. D. 370.

(c) 10 Q. B. D. 356; *Harris v. Tunn*, 5 T. L. R. 221.

stand by the hatchway and to warn the men working below to stand from under, to guide the beam of the crane by means of the guy-rope, and to tell the man who was actually working the crane when to lower and when to hoist. Through the negligence of this man, who neglected to check the movements of the crane by means of the guy-rope, an accident happened, and the plaintiff was injured. The Court said that, assuming the man whose negligence caused the accident to have been in superintendence, the accident did not occur whilst he was in the exercise of it. The accident arose from his negligence as a workman, and not as superintendent. However, in the Scotch case of *Sweeney v. McGilvray* (a) the distinction between negligence in superintendence and negligence in manual labour did not commend itself to the judges, and, though urged in argument, is not alluded to in the judgment. Shaffers's case does not seem to have been cited. Their decision goes to establish that in Scotland no distinction will be drawn between negligent superintendence and negligence of a superintendent.

Chap. VI.

"Assuming that he [the man whose duty it was to guide the crane by means of the guy rope] superintended the working of the crane, was he exercising such a superintendence as is contemplated by the Act? I am clearly of opinion that he was not a person whose sole or principal duty was that of superintendence, and that the accident was not caused by his negligence 'whilst in the exercise of such superintendence.'"

On the other hand, though there may be a duty of superintendence, if the workman superintending is "ordinarily engaged in manual labour"—is, in fact, no more than

Workman
ordinarily en-
gaged in
manual labour.

(a) 24 Sc. L. R. 91.

Chap. VI. a "ganger" (a)—he is not within the section, and the employer would not be liable for his negligence

A lamp-man in the service of a railway company was injured while crossing the railway line by reason of a truck being negligently loaded with railway spindles, some of which projected and caught the man, whereby he was crushed between that and another truck. Another man in the employ of the railway company was at the head of a body of men who loaded the truck. His negligence in not properly superintending the loading was alleged as the cause of the accident. The company's case was that he had no superintendence. His duty was to load properly. It was agreed that if his duty required him to be "ordinarily engaged in manual labour," the company were not liable (b). This was the actual ground of decision in *Kellard v. Rooke*, (c) where the person in superintendence was also engaged in manual labour. His work was hauling and throwing bales of wool into a ship's hold. The injury was sustained through a bale put in motion by him in the exercise of a duty cast upon him as an ordinary workman, which bale fell upon another workman. The negligence was thus "whilst in the exercise of" the manual labour, and not in the exercise of superintendence within the sub-section; although at the moment of the accident the person causing the injury was superintending during a temporary absence of the defendant.

(a) "Ganger" seems to be a word of uncertain connotation; see *Levening v. St. Katharine Docks Co.*, 3 T. L. R. 697, where it is assumed to signify a person "not ordinarily engaged in manual labour." With this compare per Lord Esher, M.R., in *Stamp v. Williams*, 12 T. L. R. 616.

(b) *Hall v. N.E. Ry. Co.*, 1 T. L. R. 350.

(c) 19 Q. B. D. 585, 21 Q. B. D. 367, *cp. Wright v. Walters*, 3 T. L. R. 779, which is distinguished in the Court of Appeal. In *Aitken v. Newport Slipway Dry Dock*, 3 T. L. R. 520, it was held to be negligence in a foreman having ordered one shift of workmen to disconnect machinery to omit to inform the relieving shift of what had been done.

As we have just seen, the fact of being engaged in manual labour at the moment of the accident does not render the superintendent less a superintendent if the manual work he has undertaken is merely voluntary and temporary, and superintendence is his principal duty. Neither is it necessary that the superintendence should be over the person injured, so that when a "walking foreman" interfered with work with which, it was alleged, he had nothing to do, the Court held that he was in the exercise of superintendence when he gave the order which resulted in the accident. (a)

Neither is it necessary that the superintendence should be over workmen. It may equally be within the Act if over work, and that in a different department from that in which the person injured is working.

In *Kearney v. Nicholls*, (b) where this was held by Denman, J., that learned judge puts the following case: "Suppose there was a factory, and that the person injured was one whose duty it was to go every day to the factory and put the bales of goods into carts, and suppose that the stables of the factory were totally removed from the other departments, and that the foreman of the stables negligently and improperly caused a furious horse to be put in a cart, the words of the Act would cover an injury caused by such negligence." (c)

Mr. Labatt, (d) however, says, "The superintendence contemplated by the statutes is that which is exercised over other men, not over inanimate appliances." "It is

(a) *Ray v. Waller*, 3 T. L. R. 777, *affd.* 51 7. P. 519

(b) 76 *Law Times* newspaper, 68

(c) This would be a case of defective plant under sub-a. 1; see *Tarmouth v. France*, 19 Q. B. D. 647. *Ante.* 7

(d) *Master and Servant*, 1097.

Chap. VI. clearly settled that a master cannot be held liable, as for negligence in the exercise of superintendence where the culpable person was an employé whose duty was essentially the operation of a piece of machinery, though in so doing he necessarily exercised some control over other employés who were affected by its movements": and for this proposition he cites *Faruham v. New Bank Coal Co.* (a) where an engineman engaged in hoisting the cage in a mine from the mid-working, who started the cage before the indicator showed that the gate at the entrance to the shaft was closed, and thus caused the death of a pitman, was held not to be a person having superintendence entrusted to him. In favour of the view taken by Denman, J., it may be noted that the words used, differing from those of the definition in sec. 8, are not "superintendence" merely, but "any superintendence."

Statutory rules are prescribed for working a coal mine. One of these is so systematically disregarded that the ignoring it becomes the regular practice in the mine. In consequence of the discontinuance of the statutory rule an accident happens. The mine manager is guilty of negligence in superintendence entrusted to him, in not enforcing the rule (b).

Superintendent
not a workman.

If a person has "superintendence entrusted to him" he is not able to recover as a "workman" under the Act, since to be a workman he must be "engaged in manual labour" within the definition clause; (c) while to be in

(a) [1896] 23 R. 722. See post, 207.

(b) *Baddley v. Earl Granville*, 19 Q.B. D. 423. See *Medway v. Greenwich Inland Petroleum Co., Ltd.*, 14 T. L. R. 291, *Connolly v. Young's Paraffin Light and Mineral Oil Co., Ltd.*, 22 R. 80, and Chapter II., Propositions XV.-XVIII. Ante, 35.

(c) Of the Employers and Workmen Act, 1875 (39 & 40 Vict. c. 90),
s. 10.

superintendence within the Act (*a*) he must be "not ordi-^{Chap. VI.}
narily engaged in manual labour."

A foreman handed a plank to a labourer, and called on ^{Osborne v. Jackson.} him to take it. He tried to do so, but failed through being too far off to get hold of it, and the foreman letting go his end, the plank slipped and knocked down some shoring, which fell up on and injured the labourer. On these facts a contention was raised that the foreman was not in superintendence, for that the injury was caused in the course of manual labour. The answer was that had the foreman directed some one else to do what he did, he would have been negligent in superintending, and he was no less so because he chose to take two functions upon himself, viz superintending and assisting. (*b*)

The foreman in this case, it must be noted, was "not ordinarily engaged in manual labour." His "sole or principal duty" was superintendence, and his interference in manual labour was for a special and temporary purpose.

It has been contended that to bring a case within the sub-section "the negligence complained of must occur not only during the superintendence, but substantially in the exercise of it." This, however, does not very clearly appear to be so. In *Ray v. Wallis* (*c*) the point was taken, but was not decided.

In Scotland, in *Sweeney v. McGilvray*, (*d*) the same ^{Sweeney v. McGilvray.} point seems to have been suggested. A plasterer entered into a contract with a tramway company to lay premises with concrete. To enable the work to be begun at seven

¹ (*a*) 43 & 44 Vict. c. 42, s. 8. *Post*, 129.

(*b*) *Osborne v. Jackson*, 11 Q. B. D. 619; *Donnelly v. Spencer & Co.*, 36 S. L. R. 876, 1 F. 1109.

(*c*) 3 T. L. R. 777.

(*d*) 14 R. 105, cp. *McManus v. Hay*, 9 R. 425.

Chap VI. 6'clock in the morning it was the duty of the tramway company to remove the cars there over-night. They failed to do this, and the plasterer's foreman asked the workmen to come ten minutes before seven to clear the cars out of the way for the work. The men were only paid as from seven o'clock. It was no part of the duty of either the foreman or of the men to remove the cars. They had, however, done so for a fortnight previous to the occurrence of the accident. A workman was injured through the foreman negligently pushing a tramcar against him in running it out. The workman brought an action. On behalf of the defendant it was argued that the accident was not due to anything done whilst in the exercise of superintendence, but to something done by the foreman in his capacity of labourer. This contention seems to have been disregarded by the Second Division of the Court of Session. In giving judgment, the Lord Justice Clerk was the only judge who referred to it, and he did so only to remark that if the foreman were not within sub-sec. 2, he still was within sub-sec. 3.

Mr. Spens' view.

Mr Spens^(a) considers the words were inserted "to meet some such case as this. A foreman in one department goes into another department, and, with the assent of the men working under the foreman of the latter department, gives as a volunteer manual assistance, and an accident happens through his negligence."

The words "whilst in the exercise of such superintendence" were not improbably inserted in the Act to fix the employer's liability for acts done by the superintendent during the period of his superintendency, and not rigidly to limit the employer's liability to acts of superintendence

(a) Spens and Younger, *Employers and Employed*, 228

merely. The point is, however, of very small importance, **Chap. VI.** as was intimated in *Sweeney v. McGilvray*, (a) since matters not comprehended under this sub-section are within the next.

Smith v. Harrison (b) is a case of a loom insufficiently guarded so that the shuttles flew out. Complaints had been made to the overlooker.

It is not negligence for a person in superintendence to **lawful order**, give an order for the execution of dangerous work where the nature of the work is obvious, though injury happens in the course of doing what is enjoined; (c) nor is the employer liable, where an injury occurs through an accident arising from the unsafeness of premises, when the person in charge of the work has consulted an expert, and has been advised by him that they are safe - that is, where the actual danger is not self-evident--before ordering his workman to work upon them, even if, through the fault of the expert, they are not in fact safe (d)

The Scotch case of *Cook v. Stark* (e) goes too far. **Cook v. Stark.** There it was held by the Second Division of the Court of Session that, though the manager of a work may delegate to others the ordinary operations in use in the work, yet it is his duty to give his personal superintendence to an operation which is dangerous and unprecedented, and that his failure to do so will, in the event of an accident, amount to such *culpa* as will render his master liable in damages under the Act. The learned Lords who held this seem to have overlooked the consideration pointed out by Lord

(a) 14 R. 105.

(b) 5 T. L. R. 406

(c) *Booker v. Higgs*, 3 T. L. R. 618

(d) *Moore v. Gimson*, 5 T. L. R. 177; *Kettlewell v. Paterson*, 24 Sc. L. R. 95

(e) 14 R. 1.

Chap. VI. Cairns, C., in *Wilson v. Merry* (a) "The result of an obligation on the master personally to execute the work connected with his business in place of being beneficial might be disastrous to his servants, for the master might be incompetent personally to perform the work." In the case in point this view would appear to have special force, since it would not improbably be disastrous for a general manager personally to have the superintendence of blasting operations, which would much more efficiently be entrusted to an ordinary engineer, not to say to an eminent engineer. Still, the case is in accord with the bulk of American authority.

Superintendence,
how proved.

To prove superintendence, the acts of one "in putting persons out of the shop" and what he said while doing so may be given, (b) and the question whether the principal duty was superintendence or not is for the jury. (c) The foreman of a "section gang" on a railway, who did not work himself but looked on to see that the work was done, and who gave warning of the approach of trains to the men working, has been held a person exercising superintendence. (d) So has a "working foreman" who interfered with work with which it was alleged he had nothing to do (e) But a workman who was assisting another in unloading a cart is only a fellow-workman: (f) and so is a ganger or gang-foreman ordinarily engaged in manual labour (g) The superintendence contemplated by the statute

(a) L. R. 3 Sc. App. 326, 332.

(b) *McCabe v. Shields*, 175 Mass. 493.

(c) *Riou v. Rockport Granite Co.*, 171 Mass. 162.

(d) *Davis v. New York, &c., Rd. Co.*, 159 Mass. 532.

(e) *Ray v. Wallis*, 8 T. L. R. 777, affd. 51 J. P. 519.

(f) *Allmarch v. Walker*, 78 Law Times newspaper, 391.

(g) *Hall v. N.-E. Ry. Co.*, 1 T. L. R. 359; *Kellard v. Rooke*, 19 Q. B. D. 585, 588.

is said to be that which is exercised over workmen, not that over machinery; so that an engineman engaged in hoisting the cage in a mine from the mid-working, who started the cage before the indicator showed that the gate of the shaft was shut, has been held not to be a person having superintendence entrusted to him, (a) and so too it has been held in New South Wales that one in charge of the lever working a steam-hammer is not in superintendence; (b) on the other hand, the contrary was held by Denman, J., in *Keurney v. Nicholls* (c) at New Pines and quite *obiter*.

The Massachusetts Act, it must be remembered, is in the same words as the English Act, and it has been decided in that State that the employer is not made answerable "for acts of superintendence negligently performed in his service by an ordinary workman, or by one who is both workman and superintendent in making declarations which may be interpreted either as orders of a superintendent or as assurances of a fellow-workman, if in fact they are merely such assurances." (d)

III. INJURY THROUGH CONFORMING TO ORDERS

Thirdly, the workman is to be in the same position as a licensee (e) where he is injured "by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury

III. Where the workman is injured by reason of the negligence of some one to whose orders he was bound to conform.

(a) *Farnham v. New Bank Coal Co*, 23 R. 722. *Ante*, 201.

(b) *Hannan v. Hudson*, 7 W. N. (N. S. W.) 105.

(c) 75 *Law Times newspaper*, 63.

(d) 10 *Cavagnaro v. Clark*, 171 *Mass.* 360; *Joseph v. Whitney Co*, 177 *Mass.* 176.

(e) *Ante*, 196. *Post*, 232.

Chap. VI. was bound to conform, and did conform, where the injury resulted from his having so conformed." (a)

Scope.

The scope of this provision is indicated in a judgment of Lord Cairnhill in the Scotch case of *Dohm v. Anderson*. (b) He says. "I see in the terms of the enactment no foundation for any distinction of classes upon this subject. The question is not whether the person who gave the orders or directions occupied a high or a humble position in the works. It is simply whether, whatever was his position, he was one to whose orders or directions at the time of the accident the workman injured was bound to conform. If he was, the words of the statute are satisfied, and a limitation of their operation for the purpose of restricting the benefit the statute was intended to confer would be, not an interpretation of the words of the clause, but a capricious interference with its application." To the same effect is Lord Young in *McManus v. Hay*. (c) "As I understand the expression in the statute, 'to whose orders or directions the workman at the time of the injury was bound to conform,' it means that the relative position of the parties was such that the one owed obedience to the other, and that the order was such that it could not be declined without contumacy."

Bunker v. Midland Ry. Co.

In *Bunker v. Midland Ry. Co.* (d) the Court laid considerable stress on the provision that the injured person not only does conform to orders, but is *bound* so to do. The

(a) S. 1, sub-s. 3. The Canadian and Australian Acts are in the same words.

(b) 12 R. 804, 808.

(c) 9 R. 429. *Smith, J.*, in *Kellard v. Rooke*, 19 Q. B. D. 588, was of opinion that "a mere foreman of a gang of labourers will not do."

(d) 47 L. T. 476. Cp. *Snowden v. Baynes*, 25 Q. B. D. 193; *Murphy v. Smith*, 19 C. B. N. S. 861; and the American case, *Union Pacific R.R. Co. v. Fort*, 17 Wall (U. S.) 553.

plaintiff in that case was van guard in the defendants' service, and under the age of fifteen. There was a rule of the company known to the plaintiff that no van guard under the age of fifteen should drive a van. The defendants' foreman promised plaintiff extra money to drive a van; the plaintiff consented, and whilst so engaged was injured. The Queen's Bench Division held that he had no right of action, since he was not bound to obey the order given to him (a). This ruling is identical with what has been decided in Scotland in *McMunn v. Hay*, (b) in the words of Lord Young just quoted. (c) But the elements of the injured boy's youth, the constraint put upon him by the foreman's position, and the "allurement" to a young person in an opportunity to drive, which might have availed at common law, were not touched on. The "relative position of the parties" might perhaps have induced a different decision, if probably more had not appeared than the report discloses.

Assuming, however, that the plaintiff is bound to obey an order, there is no need for the order to be by express words; it will be for the jury to say whether the order was to be implied from the circumstances. (d) The facts in *Millward v. Midland Ry. Co.* (e) showed that plaintiff, B. Millward v.
Midland Ry. Co.

(a) In *Madley v. Osborn*, 10 T. L. R. 388, the jury found that the order given was one the plaintiff was bound to obey. The evidence on which they found this is by no means clear. Indeed, it would appear from the facts that in giving the order the foreman was transgressing rules binding on himself and the plaintiff. If so, *Burder v. Midland Ry. Co.* appears directly in point, and no indication is given in the report of any assumption of overruling it. If, on the other hand, there was evidence to warrant the finding of the jury, there does not appear room for any difficulty in the decision.

(b) 9 R. 125.

(c) *L.c.* 429.

(d) *Millward v. Midland Ry. Co.*, 14 Q. B. D., per Day, J., 70, *Canavan v. John Green & Co.*, 8 F. 275.

(e) 14 Q. B. D. 68; approved *Wild v. Waygood*, [1892] 1 Q. B. 768, *Barber v. Burt*, 10 T. L. R. 383.

Chap. VI. Boy, was engaged under a carman in unloading three frames from a van. The method that ought to have been adopted was that of untying the three frames, then tying two of them up again, and removing the third. The method actually adopted was to untie the three frames, then to remove the first, without waiting to see the two remaining frames secured. The boy, without express orders, assisted in this operation and was injured. The Court held there was evidence that he had conformed to the carman's orders, which, though not expressly given, were implied from the course adopted in co-operating with the carman.

*Cox v. Hamilton
Sewer Pipe Co.*

This decision was generalized in the Canadian case of *Cox v. Hamilton Sewer Pipe Co. (a)* into the formula: "No specific order at the time of the injury is requisite—general prior orders suffice."

Hooper v. Holme (b) is in the same line of cases. A mason's labourer employed by contractors widening a railway line was killed by a passing train. Orders had been given that the work was not to be done without a look-out man being there; but there was none at the time of the accident. When the deceased arrived a mason was mixing cement for himself at the end of one of the sleepers. Deceased commenced mixing cement at the end of another. The jury found that the mason was foreman of the gang; that the deceased was bound to obey his orders; and that he ordered the deceased to commence work when there was no look-out. Mathew, J., however, directed judgment to be entered for the defendants. Was the deceased man "given an order to which he was bound to conform? The men were bound not to work unless a proper look-out was kept; special orders

(a) 14 Ont. R., per Boyd, C, 311. *Medway v. Greenwich Inland Limolous Co.*, 14 T. L. R. 291; *Grand Trunk Ry. Co. v. Weegat*, 23 Can. S.C. 422.

(b) 12 T. L. R. 537, affirmed in C. A. 13 T. L. R. 6.

had been given to that effect. To make the employer liable under sub-sec 3 there must be some one who had authority to give orders—who had a mandate from the employer—and the workman must be a man who by the terms of his contract was bound to obey the man put over him. There was no evidence that Cross [the mason] had a mandate to give such an order as the one that caused Hooper's death, or that Hooper was bound to obey. Further, there was no evidence that Cross did order the deceased to do his work in this particular way." Chap. VI.

The last case was relied on by the defendants in *Reynolds v. Holloway*,^(a) where plaintiff's husband was killed while taking down a partition in a house under orders from the foreman. There was evidence that the order was negligent. *Rigby, L.J.*, pointed out that *Hooper v. Holme* was not applicable, because in *Hooper v. Holme* "there was no order at all given to the deceased man to go into the dangerous place where he was killed, and so he might have chosen a safe place for mixing the cement." In the present case the order was definite to do a particular piece of work.

To this sub-section may more appropriately be referred the case of *Sweeney v. McGilvray*,^(b) before alluded to. Evidence was given that if the workmen had refused to do what was required of them they would have been told to "look for another job." This evidence, in the opinion of the majority of the Court, concluded the case; though, as has before been noticed, there remained the point that the injury resulted through negligent co-operation in the execution of an order not negligently given, and not from conformity to an order which in itself was reasonable and which could be safely carried out. *Shaffers v. General Steam*

(a) 14 T. L. R. 551.

(b) 24 Sc. L. R. 91. *Ante*, 199.

Chap. VI Navigation Co. (*a*) does not appear to have been cited to the Court, though *Osborne v. Jackson* (*b*) was.

McManus v. Hay In *McManus v. Hay* (*c*) the sheriff held that if the order is a proper one, then subsequent negligence is not actionable merely because it occurs in carrying out the order. That view has been disputed. (*d*) "It seems that that construction is not correct, and that the wording of the sub-section is wide enough to include *some* injuries resulting from obedience to an order not itself negligent, where the injury has been caused by the negligence of the person who gave the order." The justness of this criticism is contingent on the closeness of the connection established between the giving of the order and the negligence that follows it. The liability of the master is to be dependent on conformity of the workman to orders "where the injury resulted from his having so conformed." In law the injury must be the ordinary natural sequence from the neglect which produces it; (*e*) and it would seem, unless some special rule of interpretation is to be applied, that the injury must be the natural sequence of conformity. To produce the injury in the case suggested another cause must be introduced—negligence; and it is of this that the injury is the consequence and not of having conformed to a proper order. The fact that the workman conformed to an order not in itself negligent is only the condition, and not the cause, of the injury, and which in ordinary case would not give a cause of action against the person responsible for the order; while, so far from the action being given by the Act, it in terms provides that the injury must have resulted from having

(*a*) 10 Q. B. D. 356.

(*b*) 11 Q. B. D. 619.

(*c*) 9 R. 425.

(*d*) Roberts and Wallace, *Employers' Liability* (4th ed.), 301.

(*e*) See Wharton, *Negligence*, § 97 *et seq.*

conformed to the orders; and this, except in a perverted Chap. VI. and non-natural sense, which is nowhere imposed on the words, is not the case.

This argument derives countenance from *Martin v. Council's Quay Alkali Co.*¹ The plaintiff was engaged upon a defective waggon. The foreman called to him to be quick, whereupon, in order to save time, he gave a signal for the engine to which the waggon was attached to move. The effect was that, having started the engine, he tripped over loose bricks, lost his footing, and was injured. The Court drew a distinction between "the immediate cause" and the "remote cause" of the accident, and held that the plaintiff could not recover, as the accident was not "caused" by the defect, though it appears that had there been no "defect" there would have been no accident; since the condition of things from which the accident arose would not have existed (*b*).

In *Wild v. Waygood*,² however, the defendant's argument was that the accident in respect of which the action was brought was not caused by conformity to the orders of the man whose negligence caused the injury, in the sense of conformity being the *causa remota*, but only in the sense of its being the *causa sine qua non*, and that the section did not include responsibility for such remote consequences. The plaintiff stood on a plank in conformity to orders when

(a) 34 W. R. 216.

[61] Cf. *Cornwall Union Pacific Ry. Co., 131 L. S. (2d Div.) 370*. The facts show that a workman was injured by the fall of steel rails which he and other labourers were trying to load from the ground upon a flat car. A rail while being raised struck the side of the car and fell back. The workman was injured. The negligence alleged was that of a foreman, who moved out the train to which the car belonged on the fare of an approaching train, to avoid which the labourers were hurrying to load the rails, and failed to give the customary word of command to lift the rail in concert. The Court under a law similar to the Employers' Liability Act, 1880, held unanimously that no case was made out.

(c) [1892] 1 Q. B. 788.

Chap. VI. the man who gave the orders was guilty of an act of negligence, which caused the injury by upsetting the plank.

*Judgment of
Lord Herschell.*

This argument was unsuccessful, Lord Herschell (a) saying :

"It is not necessary to endeavour in the present case to determine or lay down any general rule as to the construction of this section beyond this, that I am quite clear it is not limited to an injury arising from an order, which order is negligent in itself. That is one contention put before us. I think the words used in the Act of Parliament are conclusive against any such construction. It would be haunting it far beyond what the words either require or will admit of. That is all I lay down as regards the construction of the section, beyond this: that I do not think it essential to show that the conformity to the order was what has been called the *causa causans* of the injury. The negligence must be proved, and if you prove the negligence then it is sufficient if, in addition to proving that, you also prove that the injury resulted, not from the negligence alone, but from the negligence and the conforming to the order." Kay,

*Judgment of
Kay, L.J.*

L.J., considered (b) the three possible constructions of the sub-section; first, that the negligence from which the injury arises must be in the order itself; secondly, that any negligence is aimed at that may occur while conforming to an order; or thirdly, that the only negligence within the section is that which is "closely connected with the order that is given." He concluded that the third construction was the correct one. Of this close connection, a phrase the Lord Justice subsequently varies by speaking of an "intimate connection," he refrains "from attempting to give any general definition that might govern other cases," (c) and is content with holding that the case before

(a) [1892] 1 Q. B. 789.

(b) *Ibid.* 795.

(c) *Ibid.* 796.

him "does come within the true meaning and intent of the third sub-section, and that is one of the very cases which it was intended to meet" Lindley, L.J. points out (a) that under the section "five things must be proved First, injury to the plaintiff; secondly, negligence of some person in the service of the defendant; thirdly, that the person was one to whose orders the plaintiff was bound to conform; fourthly, that the plaintiff did conform to those orders; fifthly, that the injury resulted in his conforming thereto"; and he suggests the test "that the injury must be the result of negligence of the person giving those orders and of the plaintiff conforming to those orders. It will not do to prove one of these things only; the injury must be the result of the two, and if the two are so connected together as to cause the injury, then it appears to me that the case comes within this section"

Chap. VI.

Judgment of
Lindley, L.J.

It is observable that nowhere is it said that where conformity is merely the *cause qua causa* of the accident, that liability attaches. For instance, a workman says to workmen who are bound to conform to his orders, "You stand here, you here, you here," and in course of the work the one next to him is injured through his negligence in doing his part of the work; it is not said in *Wild v. Waygood* that the master would be liable. The utmost extent the case goes is to include, in the words of Lindley, L.J., (b) those cases where "it is impossible to say that the injury was not caused by those two things, viz. negligence of the person giving the order, and conformity with the order," where, that is, probably, the conformity to the order is an element in the injury and not the mere antecedent of it—a co-operating cause in the actual result and not a mere step toward the result. The master is liable for a complex result,

(a) *L.c.* 793.

(b) *L.c.* 794.

Chap. VI. but not for a simple result posterior to conformity to orders

Howard v.
Bennett.

This seems the conclusion from what Lord Herschell says in *Wild v. Wuygood*, (a) dissenting from the remarks of Lord Coleridge, C.J., in *Howard v. Bennett* (b). In that case two men were working a machine; one had to start it, the other to co-operate in working it. An order was given and conformed to, immediately on which, and negligently, the machine was started and the person conforming was injured. Lord Coleridge, C.J., held that "The injury resulted, not from the directions given, but from the machine being set off too soon and at too great a speed."

Lord Herschell's
view

Lord Herschell, commenting on this, says: (c) "I cannot agree that in that case the injury which is caused by the negligent starting of the machine in such circumstances is not an injury which results from conforming to the order given. The order given was to put his hand in a certain part of the machine, which is a part where his hand will be in immediate danger if the machine is started; and his hand being there, the negligence consists in starting the machine whilst his hand is there. Under such circumstances as those, there seems to me the most immediate and intimate connection that one can conceive between the negligence which caused the injury and the conforming to the order, because it is in truth one element of the negligence that he was conforming to the order at the time." If, then, the conforming to the order is an ingredient in the wrongful act, as distinguished from a mere antecedent of it, the liability of the master does not end with the *causa causans*, but is referred back so as even to include the *causa*

(a) L. c. 791.

(b) 60 L. T. 153; 58 L. J. (Q. B.) 130.

(c) [1892] 1 Q. B. 792.

sine quâ non Thus, while it is tolerably plain that the master would not be liable where a proper order is given, by one in superintendence, to which the workman conforms and, in the subsequent course of working, is injured by an independent negligent act; and, on the other hand, it is equally plain that he would be liable where a proper order is given which concurs with a negligent act so that the joint effect produces injury; there is a third class of cases where the relation between the proper order and the negligent surroundings is too indeterminate to be more definitely formulated than it is by Kay, L.J.'s use of the phrase "intimate connection" between the order and the negligence producing the injury. Of this last class of cases *Wild v. Waygood* is a type, where the result is dependent more on the effect produced on the Court by the particular facts proved, as they may appear to approximate either to the first or second class above designated, than by reference to any general rule whatever.

Chap VI.

Both in Scotland (a) and in England (b) it has been held that where workmen are in the employ of "butty-men," who enter into a contract with the owners of the mine to get coal, and are injured by others engaged in the same system of work, they are within the provisions of the Act. When, however, two workmen are working together, for example, in cleaning and working a machine, and the one too hastily starts the machine, so that the other is injured, this is no more than the negligence of a fellow-workman, to which the Act does not apply; (c) of course this is on the assumption that one is not subordinate to the other.

(a) *Morrison v. Baird*, 10 R. 290.

(b) *Brown v. Butteley Coal Co.*, 2 T. L. R. 159. Cp. *Marrow v. Flimby & Broughton, &c., Co.*, [1898] 2 Q. B. 688.

(c) *Howard v. Bennett*, 58 L. J. (Q. B.) 129, considered and explained, *Wild v. Waygood*, [1892] 1 Q. B. 791.

Chap. VI.
Kettlewell v.
Paterson.

The case of *Kettlewell v. Paterson* (a) comes under this sub-section. A working glazier, who had been supplied by his employer with suitable scaffolding for doing the glazier work at a building, was directed by the foreman to make use of another scaffold, which had been erected by persons who had the contract at the same building for joinery work. This scaffold gave way in consequence of the joiner having carelessly constructed it of defective materials, and the glazier was injured. The scaffold was the work of a competent workman; and it was not shown that the defect could have been observed by such examination as the foreman glazier was bound to make. The Court held that there was no negligence, since the foreman of the glazier was justified in making use of a scaffold erected by a competent tradesman. This same ground would have protected the employer had the negligence alleged been a defect in the condition of ways, works, etc., under the first section.

Negligent
order.

An order to "go on" with the work in a manner which had not been usual—that is, with one workman instead of two, as has been the accustomed manner—is a negligent order. (b)

In *Marley v. Osborn* (c) plaintiff was injured through cleaning a machine while in motion, by the order of one to whose order he was bound to conform. A written notice was posted up in the workshop that machines were not to be cleaned while in motion; and this the plaintiff admitted he had seen. Nevertheless, the defendant was held liable, because "the ordinary course taken in these works was followed." The employer has been held not liable where

(a) 24 Sc. L. R. 95.

(b) *Barber v. Burt*, 10 T. L. R. 383.

(c) 10 T. L. R. 398.

one workman taking advantage of greater length of service or skill directs his fellow-workman to do work in a way that is unsafe and injury results. (a) Chap. VI.

To recapitulate:—to bring a case within the sub-section we are now considering the injury must result from conformity to an order, but it is not necessary that the injury should be caused by a negligent order. The order may be a proper one, and the negligence may be subsequent to the order, so long as it becomes imputable through conforming to the order. (b)

Negligent order
not essential.

The difficulty arises in the particular case in determining when an injury can be said to result from conforming to an order. The different aspects of the question are marked by the cases of *Snowden v. Baynes* (c) and *Wild v. Waygood*. (d)

In the former case, Sellick, a carpenter in the employment of the defendant, used to receive directions from his employer as to the work to be done, and give orders to the plaintiff and to other men as to what work each of them should do, and those orders they were bound to obey. Sellick's duty and authority with respect to the plaintiff ended there. On the morning of the accident Sellick told the plaintiff what work he was to do, and according to the ordinary course of his work he went to a particular machine in a particular shed. The shed was stated in evidence not to be a safe place for two people to work in at once. The regular time for the plaintiff to leave off work was half-past five. On the evening of the accident he elected to work overtime till seven. After the ordinary hours Sellick and

Snowden v.
Baynes.

(a) *Garland v. City of Toronto*, 23 Ont. A. R. 238.

(b) *Millward v. Midland Ry. Co.*, 14 Q. B. D. 69, *Wild v. Waygood*, [1892] 2 Q. B. D. 788 at 790.

(c) 24 Q. B. D. 568, 25 Q. B. D. 198.

(d) [1892] 1 Q. B. 783.

Chap. VI. another man came into the shed, and began to stack timber there. Through negligence a piece of timber fell, and the plaintiff was injured. He claimed against the employer in respect of his injury on the ground that he was bound to conform to Sellick's order, and was at the time of the injury conforming to Sellick's order, *i. e.* to the general order given in the morning. The jury in the County Court found in his favour on these issues. The Divisional Court set the verdict aside, and entered judgment for the defendant, holding that the injury did not result from his having conformed to any order given

Wills, J.'s
judgment

"It seems to us," said Wills, J., *(a)* delivering the judgment of the Court, *(b)* "that there is no connection between his [the plaintiff's] doing that piece of work rather than any other and the accident. Sellick had no authority to send him to any other place to work, or to exercise any discretion, or give any orders as to where he should go to do the work. . . . We think the order which is contemplated by this sub-section must be one which is really that of the person in the position of Sellick, and which is the direct offspring of some choice or exercise of judgment and will on his part; if not, it is not his order at all. Sellick had authority to say, 'You shall do this bit of work or that bit of work,' but not 'You shall do it at this place or that place.' The choice of place rested with some one else." . . . "We think it right, however, to point out that, besides the broad distinction we have already dealt with, there is one obvious difference (whether affecting the right of action or not) between a case in which the circumstances of danger are brought about by the performance on the part of the person injured, of acts the

(a) 24 Q. B. D. at 571.

(b) Pollock, B., and Wills, J.

direct result of obedience to an order then and there given, and which then expose him to immediate risk, if the person giving the order be careless, and a case in which obedience to the order is accompanied by no circumstance of present risk from the negligence of the person giving the order, and in which, if the mere fact that obedience to the order involves the presence of a workman in a spot where he is afterwards endangered by acts of the person giving the order is sufficient to give a right of action, the liability may flow from an order given a week or a month before the accident happened. In such a case it is obvious that such an order might amount to very little more than the mere selection of a particular workman to be employed upon a particular job, and it is difficult to suppose that such a case could be within the Act." Chap. VI

The Court of Appeal affirmed the decision, (a) on the ground that there was not evidence to show that Sellick had authority to tell the plaintiff where or at what time he was to work. (affirmed in the Court of Appeal.)

Wild v. Waygood (b) was the case alluded to in the Divisional Court, in Snowden v. Baynes, (c) where "the circumstances of danger are brought about by the performance on the part of the person injured of acts the direct result of obedience to an order then and there given, and which then expose him to immediate risk, if the person giving the order be careless." Plaintiff was working at the construction of a lift. A man working with him, and to whose orders he was bound to conform, directed him in the course of the work to put a plank across the well of the lift and to stand on it. While the plaintiff was on Wild v. Waygood.

(a) 25 Q. B. D. 193.

(b) [1892] 1 Q. B. 788.

(c) 24 Q. B. D. at 572.

Chap. VI. the plank the other man negligently started the lift and caused injury to the plaintiff. The County Court jury found in his favour. For present purposes the only point necessary to notice is the contention that the injury did not result from the plaintiff having conformed to the order that he should place the plank and stand on it

In the Court
of Appeal

Lord Herschell's
judgment

The Court of Appeal decided against the defendant, and held that the injury did result not alone from the negligence of the person who gave the order, but from the plaintiff having conformed to the order. "It is quite clear," said Lord Herschell, (a) "the injury did result from the plaintiff having conformed to an order when he was told to go to a place which was, and must have been known to be, a dangerous place, if the person who told him to go there was guilty of negligence. That person having been guilty of negligence created the danger and caused the injury, it seems to me the case is within the very terms of the Act."

The distinction is clearly illustrated in Judge Roberts's book (b): Suppose A temporarily placed in charge of a hand crane with B under his orders. While A is working it he calls B to take the handle. Before B can get firm hold of it A lets it go. B's arm is broken in consequence. In this case B's injury is caused by A's negligence and through B's conformity to A's order. The common employer is liable. But, if B has taken the handle, and A, telling him to go on working, leaves the place and returns later driving a horse and cart and runs over B, the common employer is not liable; though B is where he is through conformity to A's order. (c) Some such principle as is

(a) [1893] 1 Q. B. at 789.

(b) *Duty and Liability of Employers* (4th ed.), 304 summarized.

(c) *Cp. Whatley v. Holloway. Post*, 231.

illustrated by *Sharp v. Powell* (a) is at the root of the distinction: there must be a cessation of the direct efforts of the first cause and the operation of another series to exculpate the first

Chap. VI.

The word "resulted," (b) which is the word used in the sub-section, is a wider word than the word "caused," (c) which is used in the earlier part of the section. Where the order is a proper order, but through some antecedent negligence which could not be detected by the use of ordinary and reasonable care, an accident happens, the case is not within the sub-section. Thus, a working glazier had been supplied by his employer with suitable scaffolding for doing glazier's work to a building. In the course of the work he was directed by his foreman to make use of another scaffold which had been erected by persons who had the contract of the same building for joinery work. This scaffold gave way, and the glazier was injured. The scaffold was the work of a competent workman, and it was not shown that the defect could have been observed by such examination as the foreman glazier was bound to make. The Court held that there was no negligence, since the foreman of the glazier was warranted in making use of a scaffold erected by a competent tradesman. (d)

In *Wilson v. Caledonian Railway Co.*, (e) an action was held not to lie where the workman asked for a crane to assist in his work but was refused, and then in lifting a package was injured. The Lord Justice Clerk said, "So far as I can see the pursuer's case comes to this, that it is the duty of the superintendent . . . to see that

Wilson v. Caledonian Ry. Co.

(a) L. R. 7 C. P. 253. *Ante*, 66. (b) *Ante*, 121. (c) *Ante*, 123.

(d) *Moore v. Grimson*, 54 L. J. Q. B. 169. The fact that work is dangerous, and that an accident happens while it is being done, does not raise a presumption that there is negligence either in undertaking the work or in allotting it to some one else to undertake. *Booker v. Higgs*, 8 T. L. R. 618.

(e) 37 So. L. R. 231.

Chap. VI. everything which comes out of a waggon is not too heavy for a man to remove from that waggon without assistance. I cannot assent to that; I cannot say that it is negligence not to supervise to that extent. I think that in such work as moving sacks or large packages in a waggon, workmen must judge for themselves when they come to try it, whether the sacks or packages are such that they cannot move them without excessive exertion, and if they cannot then they must apply for assistance." (a)

IV. OBEEDIENCE TO RULES OR BYE-LAWS (b) CAUSING INJURY.

IV. Workman injured by act or omission of person acting under bye-laws, etc.

Fourthly, the workman is to be in the same position as a licensee (c) where he is injured "by reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or bye-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf;" "unless the injury resulted from some impropriety or defect in the rules, bye-laws, or instructions therein mentioned." "Where a rule or bye-law has been approved or has been accepted as a proper rule or bye-law by one of her Majesty's Principal Secretaries of State or by the Board of Trade or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or bye-law." (d)

The leading industries of the country are now largely conducted under codes of rules, some of these are general and statutory, others special to the particular employment.

(a) *Ante*, 20.

(b) So spelled uniformly as in the Act. The true spelling is by-law—or town law—hence a matter of internal regulation as distinguished from a constitutional provision.

(c) *Ante*, 136. *Post*, 292.

(d) S. 2, sub-s. 2. *Ante*, 125. This provision is in the Colonial statutes, but not in that of Massachusetts.

So far as these rules are general and statutory they are part of the law of the land; and a workman injured in consequence of the natural operation of one of these would have no claim against his employer, on the ground that it was the law that was defective and injured him, and not the employer's arrangements nor anything that is under his control. Chap VI.

So far as the rules are special to particular employments, they must have the sanction prescribed by Parliament before they secure the same immunity.

Typical instances of both classes of rules are given by Rules the Metalliferous Mines Regulation Act, 1872, (a) and by the Coal Mines Regulation Act, 1887 (b).

By sec. 23 of the former of these Acts, general rules are prescribed to be observed "so far as may be reasonably practicable" in every mine to which the Act applies. Under the
Metalliferous
Mines Regula-
tion Act, 1872.

If there is any question whether any workings are a mine within the Act, the question is decided finally by the Secretary of State. (c) Any breach of any of the general rules contained in the section thereupon becomes a punishable offence.

In addition to these rules, provision is further made (d) for the owner or agent of any mine to which the general rules are applicable, if he think fit, to make special rules for safeguarding the working of the mine. The suggested rules have to be sent to the inspector of the district, to obtain the approval of a Secretary of State. If the Secretary of State does not object within forty days after they have been forwarded to the inspector, the rules become

(a) 35 & 36 Vict. c. 77.

(b) 50 & 51 Vict. c. 58.

(c) S. 39.

(d) S. 24.

Chap VI. operative, and the absence of objection by the Secretary of State is equivalent to an approval of them by him

Under the Coal
Mines Regula-
tion Act, 1887

Under the Coal Mines Regulation Act, 1887, (a) a similar but more elaborate code is devised (b) applicable to all coal mines. By sec 51 the framing of special rules for each particular mine is made obligatory within three months of the commencement of the Act, or within three months of opening any new working. These special rules are those provided for by the sub-section of the Employers Liability Act, 1880, now under consideration

Under the
Factory and
Workshop Act,
1901.

By the Factory and Workshop Act, 1901, (c) where the Secretary of State is satisfied that any manufacture, plant, process or description of manual labour is dangerous or injurious to health or life or limb, he may certify the same and make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case.

Under the
Public Health
Act, 1875

By the Public Health Act, 1875, (d) sec 113, an urban authority may make bye-laws with respect to any offensive trade established since 1848, and by sec 181 these are not operative till confirmed by the Local Government Board. (e)

Under the
Public Health
(London) Act,
1891.

The sections relating to bye-laws in the Public Health Act, 1875, are incorporated in the Public Health (London) Act, 1891, (f) by the First Schedule.

(a) 50 & 51 Vict. c. 58

(b) S. 49

(c) 1 Edw. VII. c. 22, s. 73

(d) 38 & 39 Vict. c. 55

(e) As to bye-laws under this provision, see the circular letter on model bye-laws, addressed to Local Sanitary Authorities by the Local Government Board, dated 20th July, 1877

(f) 54 & 55 Vict. c. 76.

So too under the Explosives Act, 1875, bye-laws both **Chap. VI.**
 general and special may be made and approved by a
 Secretary of State or the Board of Trade. Under the
 Explosives Act,
 1875.

The above enumerated instances are not intended to be
 exhaustive of a system of control which is continually
 extending its operations.

Whether any particular bye-laws are merely private or private
 bye-laws.
 authenticated by the Government may most usually be
 ascertained on the face of them, since the Acts under which
 those having governmental sanction are issued most usually
 provide that they shall be putted with the authorization of
 the Secretary of State, or of the Government department
 empowered to approve them attached thereto.

In the event however of any difficulty arising it could
 be cleared up by an application to the proper Government
 department, or by the consideration that the *onus* of proof
 of the application of the sub-section is upon the employer.

By the common law (*k*) if a business is carried on in
 obedience to rules or bye-laws, such rules and bye-laws are
 part of the conditions of employment, and accidents thence
 arising are risks which both the contracting parties are
 held to contemplate as incidental to the employment. (*l*)
 This principle is subject to two limitations.

(1) Where the employer is cognisant of a latent defect Two limitations
 (1) Where
 workmen not
 equal means
 of knowleg.
 of which the workman has not knowledge or not equal
 means of knowledge, the employer is liable for injury
 received through the risk; (*d*) and,

(a) 39 Vict. c. 17, ss. 33-38.

(b) As to the effect of defective rules at common law, *Vose v. Lane &
 Y. Ry. Co.*, 2 H. & N. 728.

(c) *Clarke v. Holmes*, 7 H. & N., per Cockburn, C.J., 341. *Weems v.
 Mathieson*, 4 Macq. (H. L. Sc.) 215.

(d) *Bartonsmill Coal Co. v. Reid*, 3 Macq. (H. L. Sc.) 236.

Chap. VI.

(2) Where
danger is un-
necessarily
increased

(2) The employer is bound to see that the dangers attendant on the system of working are not necessarily increased by the absence of due care and reasonable means of prevention. (a)

The section works a change in the law by providing that where anything is done under a rule or bye-law regulating an establishment, the natural result of which is to work injury to a workman the employer is liable. The same principle applies where, under a rule or bye-law, some act is omitted which would otherwise have been done, and injury is caused. In other words, if the working of a rule or bye-law results in injury, inefficiency of the rule or bye-law is to be presumed, and this is so, though at common law the working might be said to be under the conditions imposed by the rule or bye-law. The meaning is pointed more clearly by the proviso that where the rule or bye-law is approved or sanctioned by the Government authorities therein specified, the employer shall not be liable, even though in its working the rule or bye-law shall have brought injury to a workman.

Effect of this
provision on the
application of
the maxim
*Volens non fit
injuria*.

The inquiry is next suggested, What is the effect of this upon the defence involved in the maxim *Volens non fit injuria*? The decisions (b) say that this defence remains to the employer. The Act says that the workman is to be in the position of a licensee where the injury occurs through the injurious operation of bye-laws, etc., which form part of the system under which the workman is employed, unless in certain excepted cases.

Effect would be given to the words of the Act, and to the law as laid down by the decisions, by considering that

(a) *Williams v. Clough*, 3 H. & N. 258.

(b) *c.g. Thomas v. Quaterman*, 18 Q. B. D. 655.

before the Act the fact of working on a system governed by rules might imply a voluntary undertaking of the risks involved in them, while by the provisions of the sub-section a change is made in the *onus* on proof that injury has resulted from bye-laws a presumption is raised that the employer is liable for their ill operation. This may be rebutted by showing that their working was known and might have been anticipated by both parties. Chap. VI.

Again, the rules may have been imposed subsequently to the workman entering the employment. Then, at common law, the rights of the workman are greater than when he enters upon an employment under conditions prescribed and manifest (c). It may well be that the effect of this sub-section is to place a workman in the particulars enumerated in the same position under the statute as he would have been in at common law, where he went on working after discovering a risk, without a full and conscious acceptance of its danger.

It is pretty obvious that the act or omission must be under the rules or bye-laws, and that an act or an omission not contemplated by the bye-laws cannot be brought under the section.

"Particular instructions" probably indicate orders given through a person without authority acting as the mouth-piece of a person with authority. Particular instructions.

A distinction has been taken between definite instructions given by the employer to a person, and instructions afterwards to be particularly formulated and delivered by the delegate. It seems useless to canvass the origin of the instructions, since the Act merely requires that they should

(a) *Clarke v. Holmes*, 7 H. & N. 937, *Holmes v. Worthington*, 2 F. & F. 533.

Chap. VI. be particular instructions when promulgated to the workman, as distinguished and apart from rules and bye-laws which are in the nature of general instructions, so that, however they emanate, they would seem to affect the employer with liability if they are issued by his authority, are improper or defective, and injury has resulted therefrom. (a)

In explanation of these words,—“in obedience to particular instructions,”—it may be noted that hitherto we have been concerned with (1) the employer, (2) the servants invested with a general authority of superintendence, (3) servants to whose orders the workman is at the time of the accident bound to conform. It is suggested that this sub-section has to do with cases where (1) there has been negligence on the part of the workman causing the injury, and (2) the injured man is not under orders. This is clear as to the earlier part of the sub-section. With regard to the words now being considered, it is necessary to fix further the meaning to be attached to the phrase “particular instructions.” So far as these words embrace definite individual orders given by a superintendent while in the exercise of superintendence, or by a person in the service of the employer to whose directions the workman is bound to conform, they are unnecessary as being covered by sub-secs. 2 and 3. They therefore probably cover the cases where a messenger has been selected to transmit special directions; and also the cases where some person of probably inferior position, or standing outside the work, has been authorized to give instruction in some phase or branch of it with power of prescribing the detailed arrangements. The former of these cases would be covered by the common law. The messenger

(a) *Whatley v. Holloway*, 6 T. L. R. 358 (C. A.), where an instruction to do a certain thing was held not to imply the instruction to do it unreasonably or without the ordinary precautions requisite to do it safely.

would be merely a conduit, and the impropriety of the instructions (a) would be personal negligence of the employer (b). In the latter case at common law, the particular instruction would be that of a fellow-servant and not actionable (c). The effect of this portion of the sub-section appears to be to create a liability for a casual director's intervention as far as it is authorized by the master in work, where there is neither superintendence nor control; but where the "impropriety of the instructions" given, even when carried out without negligence, has caused injury to a workman.

The point of what is obedience to a particular instruction was discussed in *Whitley v. Holloway*. (d) A man named Ancliffe was engaged by the defendant to attend to an engine and boiler. His duty was also to assist the plaintiff in working a circular saw; in doing which he was told not to neglect the engine. At the time of the accident, Ancliffe and the plaintiff were at work with the saw—the plaintiff feeding it with wood, Ancliffe, at the other end, receiving the wood as it came from the saw, and holding it so as to steady it. A noise being heard from the engine indicating that it required attention, Ancliffe let the piece of wood he was holding go without warning. The result was that the piece of wood the plaintiff was holding was rendered unsteady, and plaintiff's hand was jolted against the saw and injured. The jury found a verdict for the plaintiff with £10 damages. The question was whether there was any evidence warranting the jury finding under the sub-section that there was an act or omission done or made in obedience to particular

(a) S. 2, sub-s. 2. *Ante*, 125.

(b) *Ante*, 21, 25.

(c) *Ante*, 41.

(d) 6 T. L. R. 190; in Q. A. 959.

Chap VI instructions The plaintiff's contention was that the injunction to Ancliffe not to neglect the engine was a particular instruction, obedience to which had caused the accident. The defendant's contention was that no particular instruction within the sub-section had been given; or if the instruction was to be held a particular instruction, that Ancliffe's act was merely the negligent act of a fellow-servant and not done in obedience to it

Ex. L.J.'s
judgment in the
Divisional
Court.

The inclination of Fry, L.J.'s opinion, was in favour of the defendant's contention on the first point, which, however, he assumed in favour of the plaintiff. He thus continues: "The rule laid down for Ancliffe was not to neglect the engine. Did that mean that he was to attend to the engine with due regard to the safety of the lives of others, or was it a wicked rule that he was to look after the engine at all hazards, without regard to the safety of others? He had no hesitation in saying that the instruction was a reasonable one, that the engine was to be Ancliffe's first care, at the same time leaving his other work in a proper and reasonable manner. The question may be tested in another way. Supposing Ancliffe had waited for a few seconds, and before leaving told the plaintiff to take his hands off the wheel. In his opinion that would not be disobedience to the rule. Therefore there was no rule requiring Ancliffe to do as he did . . .

The injury, therefore, was caused here, not by Ancliffe's obedience, but by his disobedience to his instructions." Judgment was accordingly entered for the defendant. This was affirmed in the Court of Appeal, where Lindley, L.J., said, (a) "No doubt Ancliffe was required to attend to the engine, but the instructions did not require him, when it was necessary to attend to the engine, to leave the saw without giving his mate notice. It was impossible to

Lindley, L.J.'s
judgment in the
Court of Appeal.

(a) *L. c.* at 354

construe Ancliffe's instructions as involving this, that he Chap. VI.
must go away without giving notice to the plaintiff."

In *Claxton v. Mowlem & Co., (a)* the plaintiff was in the Claxton v.
Mowlem
employment of the defendants, who were contractors. His work was unloading ballast. The ballast was raised in buckets attached to the chain of a steam crane. As one bucket was raised another bucket was lowered into the lunge from which the loading was going on, and in which the plaintiff was working with other men. A banksman gave the signal to the driver of the crane to raise or lower the buckets. On the occasion of the accident the men in the lunge had attached the bucket to the chain and called out, "Lower away; steady!" The banksman called to the driver of the crane, "Lower away!" meaning to lower away quickly. The driver lowered quickly, and the bucket fell on the plaintiff and injured him. The question in the Court of Appeal was whether there was any evidence that the direction of the banksman to "lower away" was a particular instruction given by a person delegated with the authority of the employer. The Court held it not to be so. Lord Esher, M.R., said: "The banksman . . . gave no instructions to any one; he merely gave notice. But assuming that he did give orders, a person who was told to do a particular thing was not 'delegated with the authority of the employer.' Those words referred to a manager, or a person in the position of a manager, who was put into the position of his employer to do or to abstain from doing what the employer would do or abstain from doing. If there was any negligence here, it was in the banksman, and he was nothing more than a fellow-servant."

Chap. VI. V. CHARGE OR CONTROL OF ANY SIGNAL, POINTS, ETC., ON
A RAILWAY

✓ Workmen
may recover
where injured by
the negligence
of any person in
the service of the
employer who
has the charge or
control of any
signal, points,
etc., on a railway

Fifthly, the workman is to be in the same position as a licensee (*a*) where he is injured "by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway" (*b*)

"I cannot help thinking," says Lord Halsbury, C., (*c*) "that the Legislature meant in a very wide way to protect workmen who are engaged in such dangerous employments, and they said, as an exception to the ordinary rule of law, that if the person in charge of a locomotive or of a train shall be guilty of negligence, then, quite apart from any question of superiority of employment, and quite apart from the necessity of superintendence, the employer may be liable."

The definition clause of the Act, (*d*) which we shall consider more minutely presently, provides that the expression "workman" means, amongst other things, "a railway servant." The present sub-section appears to have been introduced for their benefit.

The decisions upon this section have placed the natural, as distinguished from a technical, meaning on the terms used. Thus, in *Doughty v. Eribank* (*e*) it is held that railways used by colliery owners and others upon which trains run are within the section, and that it is not to be limited

Doughty v.
Eribank.

(*a*) *Post* 212

(*b*) S. 1, sub-s. 5, *ibid.*, 125. All the Employers Liability Acts, Colonial and American, contain provisions for the protection of railway servants, but there is considerable diversity in their language.

(*c*) *McCord v. Cammell & Co.*, [1896] A. C. 63.

(*d*) S. 4, *Ante*, 129.

(*e*) 10 Q. B. D. 358. In Massachusetts, a short railway track intended for temporary use by a city in transporting gravel has been held a railway *Coughlan v. Cambridge*, 166 Mass. 268.

in its applications to railways used by railway companies. **Chap. VI.**

It applies where there is "a way upon which trains pass by means of rails." In *Cox v. G. W. Ry. Co.*, (a) trucks ^{ox v. G. W. Ry. Co.} coupled together in the usual way, though with no locomotive engine attached, and only a stationary hydraulic engine and a capstan by which they were moved, were held to be a train. In *Murphy v. Wilson* (b) an attempt to comprehend under the term "locomotive engine" a steam engine so fixed on a trolley that, by means of shifting gear working on the axles of the trolley, the crane and trolley could be moved from one place to another along rails, was unsuccessful. Pollock, B., thus expressed his view: "The term 'locomotive engine' has a well-known significance, and is used generally for an engine to draw a train of trucks or cars along a permanent or temporary set of rails. There is also a well-known class of engines, such as traction engines, which, though they are capable of being moved from place to place, are never spoken of as locomotive engines (c) . . . If the Legislature had intended to include any such machine, they would have used proper terms. I can see no reason why the defendants in this case should be held liable under this section any more than if it were a case of a steam printing machine or a punching machine."

In *McCord v. Cannell*, (d) Lord Halsbury, C., doubted "a train," very much whether the Legislature intended the words "a train," as used in the sub-section now being considered, to be used narrowly. "The Legislature meant that a locomotive engine by itself, or anything that was drawn along

(a) Q. B. D. 106.

(b) 53 L. J. Q. B. 524.

(c) But see *Powell v. Fall*, 5 Q. B. D. 597.

(d) [1896] A. C. at 64.

Chap. VI. a railway, or was in course of being drawn along a railway by that locomotive engine, should be included in a train.”
“I doubt very much whether it would depend upon the number of carriages or the number of vehicles going upon wheels which the locomotive was taking along the railway. I should think the Legislature intended a very wide scope to be given to the use of these words.” (a) And Lord Watson said (b) “The words ‘any person having charge or control of the train’ do not, in my opinion, necessarily point to *one* person who is in charge of the whole train. Different duties in connection with different parts of the train may be assigned to different persons, and, in that case, each and all of those persons are charged with the conduct of the train, and, if any one of them be negligent in his own department, that will constitute ‘negligence,’ bringing the case within the terms of sec. 1, sub-sec. 5.” The consideration which had weight with one of the judges in the Court of Appeal, that the duty having been committed to a great many people, any one of whom might have performed it, therefore the person actually performing it was not “in charge,” was in the House of Lords regarded as “very immaterial.” The statute points directly to the person having “the charge or control of the train” as being that person who at the time when the negligent act is committed has the duty cast upon him of performing that act with reasonable care.

scope of the
sub section.

By the interpretation clause “workman” means a railway servant amongst others; therefore any person who can bring himself within the meaning of the term is entitled to recover, not, indeed, for the negligence of any

(a) Cf. *Caron v. Boston, & Rd. Co.*, 164 Mass. 523. In *Massachusetts* a locomotive and a single car connected and run together has been held to be a train. *Shea v. New York, &c. Rd. Co.*, 173 Mass. 177.

(b) [1896] A. C. at 65

other railway servant, but for the negligence of those **Chap. VI.**
 classes of railway servants who are specified in the sub-
 section—that is, those “in charge or control of any signal,
 points, locomotive engine, or train upon a railway.”

On the meaning of the words “charge or control” in this ^{“charge or control”}
 connection, *Gibbs v. G. W. Ry. Co.* (a) is to be looked at. ^{11 Q. B. 22.}
 The decision is an earlier one than that just noticed. A
 workman in the signal department of the defendants’ railway
 had to clean, oil, and adjust the points and wires of the
 locking apparatus at various places along a portion of their
 line, for this purpose he was subject to an inspector, who
 was responsible for the points and locking gear, which were
 moved and worked by men in the signal-boxes. This
 workman took the cover off some points and locking gear
 in order to oil them, and negligently left it propped over
 the metals of the line, and so caused injury to a fellow
 workman. The attempt to render the company liable for
 the neglect as that of a person in the service of the
 employer who has the charge or control of points failed
 both in the Divisional Court and in the Court of Appeal.
 In the Divisional Court, Field, J., discussing the meaning
 of “charge or control,” doubted “whether the words ‘charge
 or control’ are intended to mean different things;”
 Mathew, J., thought that the Legislature had in contempla-
 tion “the negligence of some person having charge or
 control of the points for the purposes of traffic and of
 movement.” In the Court of Appeal, Brett, M.R., (b) draws ^{Judge}
 a distinction between charge and control. His words are,
 “I cannot think that there is any colour for saying he [the
 plaintiff] had the control of the points, and the only
 question is whether he is a person who had the charge of

(a) 11 Q. B. D. 22; 12 Q. B. D. 208.

(b) 12 Q. B. D. 212.

Chap. VI. them within the meaning of the statute. I think that to be such a person he should be one who has the general charge of the points, and not one who merely has charge of them at some particular moment." Lord Coleridge, C.J., too, discussing whether the workman whose fault was alleged had charge or control, said (a) "He certainly had to do something from time to time to the machinery connected with the points, but he himself said he worked under the direction of Saunders [the inspector], and Saunders was called, and he proved, I think, that he was the person who had apparently both the charge and the control of the points, and that Fisher [the workman] was only a workman under him, and was not a person who had either the charge or the control of any points connected with the railway."

Judgment of
Lord Coleridge,
C.J.

Is a tramway a
railway?

A good deal of ingenuity has been (extra-judicially) expended on the question whether a tramway is a railway within the section. Originally, doubtless, and in general usage the terms may have been convertible. Now, however, a distinction is drawn, (b) and the principle avails in this case also, that was at the root of the decision in *Murphy v. Wilson* (c)—that words expressing well-known objects are to be confined in their ordinary usage to the designation of them.

Compensation.

Compensation.

Where the workman establishes his right to compensation under the Act, the amount he may recover is limited to "such sum as may be found to be equivalent to the

(a) 13 Q. B. D. 210. Cp. *Caion v. Boston, etc. Rd. Co.*, 164 Mass. 523.

(b) The Tramways Act, 1870 (53 & 54 Vict. c. 78). *Swansea Improvements and Tramway Co. v. Swansea Urban Sanitary Authority*, [1892] 1 Q. B. 857. Notice of Accidents Act, 1894 (57 & 58 Vict. c. 28), sch. "railway, tramroad, and tramway."

(c) 52 L. J. Q. B. 524.

estimated earnings, during the three years preceding the injury, of a person in the same grade, employed during those years in the like employment and in the district in which the workman is employed at the time of the injury" (a) Chap. VI.

In *Bartick v. Havel*, (b) a Divisional Court, overruling the County Court judge, decided that the Act did not lay down a measure of damages, but merely imposed a limit beyond which damages should not be recovered, so that when a jury estimated a sum for overtime work which the plaintiff had earned for another employer than the one in whose service the plaintiff was injured, the plaintiff was allowed to recover the same assessed. Bartick v. Havel.

Now *Redcliffe Foundry Co. (c)* deals with the earnings of an apprentice with a salary of 1s. a week, which progressed yearly. In his fifth year, when he was injured, he was getting 7s. a week. At the end of the year his apprenticeship would have ended, and his rate of wages as a workman might amount to 18s. a week. The County Court judge awarded £80. The defendants appealed, but conceded damages for three years at 5s. a week, i.e. £30. In view of the concession the Court did not conceive that it was bound to cut down this sum, but were not "satisfied that on the true construction of the section, the standard of the actual earnings during the last three years preceding the injury can be left out of consideration, and that only the words 'estimated earnings of a person in the same grade employed in the like employment, and in the district in which the workman is employed,' are to be taken into account, the suggestion being that the only standard of Apprentice's earnings how calculated

(a) S. J. *Ant.*, 126.

(b) 53 L. T. 909.

(c) [1890] 1 Q. B. 453.

Chap. VI. calculation is the rate of wages earned by persons of a similar class at the time of the accident, a proposition to which I (a) am not, as at present advised, prepared to assent." In the same case it was contended that the expression "earnings" could be construed to include the value of an apprentice's tuition. The Court would not admit this, though willing to concede that "food or clothing which could be estimated at a money value might be taken into account."

This accords with the decision in *Bottick v. Head, Wrightson & Co.* (b) that a jury may take into consideration the wages earned by the workman during his working overtime for an employer other than the employer in whose service the injury complained of is received.

Base of
calculation.

The compensation is to be calculated on the basis of the rate of wages in the district where the workman was working at the time of the injury. If, then, during the three years the workman has passed from a district where a lower rate of wages prevails to one where the rate is higher, the compensation is to be reckoned all through at the higher rate.

Actual pay-
ments to be
taken into
account.

It seems that the actual payments made to the injured person in respect of earnings are to be taken into account; at least that seems to be the inclination of the opinion of Wills, J., in *Noel v. Redruth Foundry Co.* (c) yet if the earnings of such person are for any special reason abnormal, then the average rate of wages is to be considered. For example, if a workman were engaged for a special sum to do a particular work, in the event of injury the compensation to

(a) Wills, J.

(b) 2 T. L. R. 103.

(c) [1896] 1 Q. B. 452. "Earnings means actual earnings". *Cadzow Coal Co. v. Gaffney*, 3 F. 72; but see per Stirling, L. J., *Ayres v. Buckeridge*, [1902] 1 K. B. at 70, under the Workmen's Compensation Act, 1897.

him would not be settled on the estimate of three years' earnings at the same rate, but at the average rate of the same grade of workmen in the district, or, again, if a workman were being paid specially low wages for some exceptional reason or were a volunteer working for the time at no wages at all, the computation of compensation would not be that of the personal rate, but that of the general rate of the grade of workmen in the district. If, however, the wages of the workman were fixed by actual work in a certain position—for instance, as an apprentice or as a labourer—he would not be enabled to recover a higher compensation than that of the grade in which he was actually at work, because he was competent to work in a higher grade, or indeed was habitually employed in a higher grade. (a)

Under the standard fixed by the Act no deductions in respect of strikes and sickness are provided for. The earnings are the full earnings for three years. Of course a jury in any case may make these or other deductions, they are, however, not compelled to do so, although, in no case may they give compensation beyond the maximum of three years' estimated earnings, subject to the deduction specified in sec. 5. (b)

In the New South Wales Act (c) the value of any payment in respect of the injury, and also the value of any insurance made by the employer on behalf of the workman, are to be taken into account. There is no such provision in the British Act. The matter is dealt with by the liberty there is of contracting out of the Act. (d)

A voluntary payment made by the employer in respect of Voluntary payment ;

(a) *Norfolk & Norwich Foundry Co.*, *supra*.

(b) *Id.*, 127.

(c) 50 Vict. No. 8, s. 6.

(d) *Griffiths v. Earl Dudley*, 9 Q. B. D. 357.

Chap. VI. of an injury for which compensation is subsequently sought under the Act, may undoubtedly be given in evidence in reduction of damages, and a jury would probably consider it in their award. They are, however, not compelled to do so; and may, if they please, notwithstanding any voluntary payments, award the full three years' estimated earnings. In New South Wales they would be unable to do this.

Lord Campbell's Act.

Where death has ensued upon injury, the action must be brought under Lord Campbell's Act, (a) and then only the loss of the reasonable expectation of pecuniary benefit can be taken into account; and thus a deduction must be made in respect of insurance money receivable. (b)

Damages awarded in Scotland

In Scotland, (c) in the Sheriff Courts, damages awarded for the death of a man who has left a widow and a child or children have been apportioned, the widow being allowed half, "the other half being reserved for the children when they came to sue."

In England the matter is regulated by sec. 2 of Lord Campbell's Act, (d) whereby the damages may be apportioned amongst those entitled "in such shares as the jury by their verdict shall find and direct." (e) Where the action is brought in the Chancery Division, it has been decided that the Court has power to apportion in such manner as a jury could have done. (f)

Time for giving notice and bringing action.

Notice that injury has been sustained must be given

(a) 3 & 10 Vict. c. 93.

(b) See Proposition VI, Chapter V. *Ante*, 114.

(c) *Nyens and Younger, Law of Employer and Employed*, 317. *Cp. Sanderson v Sanderson*, 36 L. T. 847.

(d) 9 & 10 Vict. c. 93, amended by 27 & 28 Vict. c. 95. This Act does not apply to Scotland. *Ante*, 104.

(e) 9 & 10 Vict. c. 93, s. 2.

(f) *Bulmer v. Bulmer*, 25 Ch. D. 409.

within six weeks (*a*) from the occurrence of the accident Chap. VI.
causing the injury, and the action must be commenced
within six months (*b*) from the same date. In the case of
death resulting the time to bring an action is extended to
twelve months. The want of notice is no bar to the main-
tenance of the action "if the judge shall be of opinion that
there was reasonable excuse for such want of notice" (*c*).

In the Scotch case of *Johnston v. Shaw*, (*d*) the plaintiff *Johnston v.*
Shaw.
sought to excuse non-compliance with the provision for
the bringing of action within six months, alleging that,
between the time of giving the notice and the expiration
of the six months, he was confined in a lunatic asylum in
consequence of his faculties having become impaired by
reason of the accident. The provision was, however, held
obligatory, and it was ruled that, beyond the time mentioned,
no action under the Act could be maintained.

Clark v. Adams, (*e*) another Scotch action under this *Clark v. Adams*
section, raised a somewhat peculiar point. An action was
brought at common law, and was decided against the
pursuer, who appealed to the Court of Session. At the
hearing of the appeal it was stated that the pursuer had
become aware that he had given notice under the Em-
ployers Liability Act, 1880, and he sought to treat his
common law action as if it had been brought under the

(a) In *McDonough v. MacLellan*, 13 R. 1000, the injury was suffered on
the 7th of May, and the notice was sent by post, so that the employers
could not receive it before the 19th of June. Held, too late.

(b) By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3, the ex-
pression month is to mean calendar month in every Act passed after
the year 1850. Cp *Brunner v. Moore*, [1901] 1 Ch. 205.

(c) 43 & 44 Vict. c. 42, s. 4. *Ante*, 126. See *Provis v. Gattu*, 4 T. L. R.
487; *McLeod v. Pire*, 20 R. 381. In New South Wales this provision
has been held to apply only where due notice has not been given, and not
where no notice at all has been given. *Thompson v. Southern Coal Co.*,
15 N. S. W. L. R. (L.) 162.

(d) 21 Sc. L. R. 246.

(e) 12 R. 1092.

Chap. VI. statute. The Court seem to have considered that this might be done within the six months, (a) but held that since the time specified in the Act was elapsed it was not possible in the particular case before them.

Conroy v. Pascock,
Erroneous
decision.

Cave and Lawrence, J.J., decided in *Conroy v. Pascock*, (f) regarding, or at least treating, the point as too clear for argument, that in an action under the Employers' Liability Act, 1880, the defendant cannot rely upon the defence that the notice of injury required by sec. 1 of the Act has not been given, unless he has given notice that he intends to rely upon it as a statutory defence pursuant to Order X. rr. 10, 18 of the County Court Rules, 1886 (c) Want of notice of injury, says Cave, J., "is clearly a 'statutory defence,' because but for the statute no notice of injury would be necessary." The words of the section on which the learned judge was deciding show that an action under the Act "shall not be maintainable unless notice . . . is given" (d). In the absence of notice of injury and notice by the defendant of statutory defence, the defendant must wait (outside the Court would probably be preferable) (e) while the judge is eluding the want of that notice which the statute makes an integral portion of the plaintiff's cause of action; and if judgment is then given ignoring the requisites of the statute, on an appeal to a competent

(a) *Moorsom v. Band*, 10 R. 271, *Mann v. Scott*, 12 R. 915; this seems to have been a sort of informal procedure under s. 13. In Scotland it has been held that the question whether the employer is to send notice of injury to the employee is reasonable and may be decided either at the adjustment of issues, or at the trial, in the discretion of the judge. *Trail v. Kellman*, 15 R. 1.

(b) [1897] 2 Q. B. 6.

(c) Now rr. 10, 18 of Order X. of County Court Rules, 1903.

(d) *Keen v. Millwall Dock Co.*, 8 Q. B. 10, per Lord Coleridge, 481; per Brett, L.J., 485. *Clarkson v. Musgrave*, 9 Q. B. 10, per Field, J., 290. "It is clear that the notice is a condition precedent to the right to sue."

(e) *Edwards v. G. W. Ry. Co.*, 11 C. B. 588, 650, *Park Gate Iron Co. v. Conates*, L. R. 5 C. P. 634.

Court, *Conroy v. Peacock* must be formally overruled **Chap. VI.**
 Ignorance of the need of a notice had been held not to be
 a "reasonable excuse" for the absence of notice.

The Scottish Courts have been a bit exigent in the ^{Scottish decisions on notice.}
 matter of the notice. Thus in *McFadyen v. Dalmeellington*
Iron Co (b) they refused to dispense with the notice though
 the pursuer alleged that he was an old man and ill-temperate,
 and that during the six months it was not known whether
 the deceased would survive and take proceedings himself.
 And in *Connolly v. Young's Paraffin Light and Mineral*
Oil Co (c) they refused a dispensation where the action was
 brought by the widow, who claimed indulgence on the
 ground of her forgetfulness caused by her grief.

But Field, J., in *Beckett v. Manchester Corporation*, (d) ^{Field, J., in Beckett v. Manchester Corporation}
 said: "It matters not how defective the notice was, if it can
 be shown that it has not injured the defendants, that is to
 say, if the defendants are not at the trial taken by surprise
 in consequence of the defect"—in that case the omission
 of the address and the date.

PUBLIC AUTHORITIES PROTECTION ACT, 1893

Public Authorities Protection Act, 1893.

The Public Authorities Protection Act, 1893, (e) applies
 in the case of a fatal accident under the Act, notwithstanding

(a) Ex parte *Hunt* (1888, 5 W. L. R. 1114, 122). Want of notice has
 been excused on the ground that the widow of the deceased came to an
 advanced stage of pregnancy and so could not be expected to forward her
 being spoken to on the subject. *Ex parte* *Widow of Hunt*, 11 R. 22, 1 Em-
 ployers' Liability (17th ed.) 71. In New South Wales the excuse that the
 plaintiff had been for a long time in hospital, and was not in a fit state to
 go on with the action, has availed. *Miller v. Pitt* (1881, 8 S. W.)
 1 W. N. 166, 2 W. N. 17. So has an explanation that negotiations
 between the widow and the employer were begun within the six weeks,
 but letters of administration were not granted till nearly eight months
 after. *Bidman v. Robertson* (1887, 5 S. W. 14 W. N. 14).

(b) 24 R. 327.

(c) 22 R. 80.

(d) 52 J. P. 346. There is an instructive Massachusetts case, *Ledwidge*
v. Hathaway, 170 Mass. 348.

(e) 50 & 57 Vict. c. 67.

Chap. VI. that the Employers Liability Act allows a year from the time of death for commencing an action (a) This being so a synopsis of the provisions of the Act is given.

1. No action, (b) prosecution, or proceeding (c) will lie against any person for any act done in intended execution (d) of any public statutory duty, or for any alleged neglect thereunder, (e) unless commenced within six months after the occurrence of the event from which it

(a) *Markey v. Todworth Joint Isolation Hospital*, [1900] 2 Q. B. 151.

(b) This includes actions where an injunction is asked for, see s. 1, sub-s. (c) (and thus supersedes the law laid down in *Flower v. Law*, *Leiston Local Board*, 6 Ch. D. 3171, *Chapman v. Auckland Union*, 23 Q. B. D. 291, and all actions in the Chancery Division, *Hartopp v. Mayor of Gilling*, [1898] 1 Ch. 525, or elsewhere, so long as the action is brought against any one for an act done in pursuance of execution or intended execution of any Act of Parliament. *The Nolan*, [1899] 1 P. 236, and extends even to the working by a municipality of a tram system under statutory power, *Parker v. London County Council*, [1901] 2 K. B. 501, but not to the case of a contractor doing work for his own profit which a public authority has been authorised to do. *Kent County Council v. Folkestone Corporation*, [1905] 1 K. B. 620. It covers an ordinary action for personal negligence. *Lyles v. Southland-on-Saet Corporation*, [1905] 2 K. B. 1, but not the breach of a private contract entered into in contemplation of a public duty. *Sharlington v. Pullham Contractors*, [1904] 2 Ch. 419, *Clarke v. Lewisham District Council*, [1904] 1 T. L. R. 62, nor yet a breach of duty by any company performing duties of public authority, but also earning profit for its proprietors, e.g. a railway company. *A.G. v. Margate Pier and Harbour Co.*, [1900] 1 Ch. 749. *Pearson v. Dublin Corporation*, [1905] 21 R. 27. In *Wick v. Stenning* (in a resolution dismissing a schoolmaster) upon which he founded an action against the School Board, were held within the Act. *Raid v. Bilsland School Board*, 17 T. L. R. 620. Officers of a local board acting under orders to vacate a right of highway are held protected in an action for trespass brought against them, *Greenwell v. Howell*, [1900] 1 Q. B. 635. An action in tort is not within the Act. *The Burns*, [1907] P. 117. Applying *The Longford*, 14 P. D. 34; nor is one for goods sold and delivered and for work and labour. *Millford Dock & District Council*, 65 J. P. 183.

(c) *I.e.* applications under 11 & 12 Vict. c. 44, for *mandamus*, prohibition, or *certiorari*, not made by a department of the Government. The time for moving these writs is limited by the Act to six months, and the law as stated in the *Queen v. Mayor, &c., of Sheffield*, L. R. 6 Q. B. 652, is now altered, except in the case of a *certiorari* to justices.

(d) *Clothier v. Webster*, 12 C. B. N. S. 700. The intention is no defence on the merits. *Selmos v. Judge*, L. R. 6 Q. B. 721.

(e) *Jolliffe v. Wallasey Local Board*, L. R. 9 C. P. 62.

takes its rise; or in the case of a continuing damage (a) Chap. VI. within six months after its cessation. (b)

2. Where the defendant succeeds he is entitled to costs to be taxed as between solicitor and client. (c)

3. Where the action is for damages the defendant may plead tender of amends (d) before action, or may make a payment into Court. If no more is recovered (e) than is tendered or paid the plaintiff is not to recover any costs incurred subsequent to the tender or payment, but the defendant is to have his costs subsequent thereto as between solicitor and client. (f) This provision does not affect the costs of an injunction.

4. Where the defendant is in the opinion of the Court not afforded "sufficient opportunity of tendering amends" before the commencement of proceedings, the Court may award costs against the plaintiff as between solicitor and client.

(a) The calculation of the six months runs from the time of the legal injury. *Osler v. Rochford Rural District Council*, [1900] 1 Ch. 312. The prolonged effect of an injury is not a continuance of the act causing damage. *Carey v. Metropolitan Borough of Bermondsey*, 20 T. L. R. 2, *Markley v. Tolworth Joint Isolation Hospital District Board*, [1900] 2 Q. B. 454, *Williams v. Mersey Docks and Harbour Board*, [1901] 1 K. B. 504, *Spittal v. Glasgow Corporation* (n), 6 F. 824. *Pooley v. Fordingham*, [1902] 2 K. B. 345, *Turley v. Daw*, 22 T. L. R. 231.

(b) *Crambrie v. Wallasey Local Board*, [1891] 1 Q. B. 503.

(c) *Avery v. Wood*, [1891] 3 Ch. 115, *Andrews v. Barnes*, 39 Ch. D. 133. The general law applies to the plaintiff's costs. 33 & 34 Vict. c. 44, s. 5, R. S. C. 1893, Order LXV. r. 1. *Rever v. Gibbon*, [1891] 1 Q. B. 652, *Hasker v. Wood*, 54 L. J. (Q. B.) 419.

(d) *Davy v. Richardson*, 21 Q. B. D. 202.

(e) "Recover." In clause (e) of s. 1 means recover by judgment, or by consent order. *Smith v. Northleach Rural Council*, [1902] 1 Ch. 137.

(f) The discretionary power under Order LXV. r. 1. to deprive the defendant of his costs is not taken away by this provision. *Bostock v. Ramsey Urban District Council*, [1900] 2 Q. B. 616, and the Act does not apply to appeals. *Frieden v. Blorley Corporation*, [1900] A. C. 133. No special direction is needed for the defendant to take advantage of the Act: *North Metropolitan Tramways Co. v. London County Council*, [1898] 2 Ch. 145. A consent order dismissing an action with costs is equivalent to a judgment. *Shaw v. Hertfordshire County Council*, [1899] 2 Q. B. 282.

Chap. VI**Penalty.****Penalty**

By sec. 5 (*a*) any penalty which is paid to the injured workman in pursuance of any Act of Parliament is to be deducted from the compensation payable in respect of a cause of action under this Act; and where the action has been brought previously to the payment of any penalty, the workman is not to be entitled to receive any such penalty paid in respect of the same cause of action. (*b*)

Scope of the section.

Three states of fact seem contemplated under the first words of this section: -

- (1) The workman himself recovering in respect of his injuries.
- (2) In the event of death, his executor or administrator recovering.
- (3) In the event of death, and no executor or administrator being appointed, or if appointed neglecting to bring an action within six calendar months of the death, "all or any of the persons for whose benefit the personal representative of would be sued," recovering by virtue of sec. 1 of 27 & 28 Vict. c. 35 (*c*)

An absolute assignment by writing of a legal chose in action under the Judicature Act, 1873, (*d*) may also have been in the contemplation of the framers of the section. (*e*)

(*a*) *Ante*, 127.

(*b*) In *Blenkinsop v. Ogden*, [1898] 1 Q. B. 783, the contributory negligence of the injured person was held to be no answer to proceedings for the penalty.

(*c*) *Ante*, 107.

(*d*) 36 & 37 Vict. c. 66, s. 25, sub-s. 6.

(*e*) As to a chose in action, see per Fry, L.J., *Colonial Bank v. Whimney*, 80 Ch. D. 261 at 285, affirmed 11 App. Cas. 426, also *Law Quarterly Review*, (1898) vol. ix., 811.

By the Coal Mines Regulation Act, 1887, (a) every **Chap VI** person guilty of an offence for which a penalty is not expressly prescribed against the Act, shall be liable to a ^{penalty, how to be applied} penalty not exceeding, if he is an owner, agent or manager, ^{Coal Mines Regulation Act, 1887} £20. By sec. 70, where there has been neglect to send a notice of any explosion or accident, or where an offence against the Act has occasioned loss of life or personal injury, a Secretary of State may (if he think fit) direct any penalty imposed in respect of the same neglect or offence to be paid to or distributed among the persons injured, and the relatives of any persons whose death may have been occasioned by such explosion, accident or offence, provided that the persons so injured or killed have been guilty of no contributory negligence.

There are similar provisions in Part III of the ^{Metalliferous} ~~Metalliferous~~ Mines Regulation Act, 1872 (b).

Under the Factory and Workshop Act, 1901, (c) if any ^{Factory and Workshop Act, 1901} person is killed or injured in consequence of the occupier of a factory or workshop having neglected to observe any provision of this Act, or any regulation made in pursuance of this Act, the occupier of the factory or workshop shall be liable to a fine not exceeding £100, and in the case of a subsequent conviction in relation to a factory within two years from the last conviction for the same offence not less than £1 for each offence, and the whole or any part of the fine may be applied for the benefit of the injured person or his family or otherwise, as the Secretary of State determines.

(a) 50 & 51 Vict. c. 58, s. 59 (2).

(b) 35 & 36 Vict. c. 77, ss. 31-38.

(c) 1 Edw. VII. c. 22, s. 136. In *Blackinsop v Ogden*, [1898] 1 Q. B. 788, the contributory negligence of the injured person was held to be no answer to proceedings for the penalty.

Chap. VI. **Provided that—**

(a) In the case of injury to health the occupier shall not be liable under this section unless the injury was caused directly by the neglect. (a)

(b) The occupier shall not be liable to fine under this section if an information against him for not observing the provision or regulation to the breach of which the death or injury was attributable has been heard and dismissed previous to the time when the death or injury was inflicted

The meaning of "factory" is extended by sec. 104 (a) to docks, wharves, quays and warehouses; and by sec. 105 (b) to premises on which machinery worked by mechanical power is temporarily used for the purpose of the construction of a building or any structural work in connection with a building; also by sec. 106 (c) to certain railway sidings.

Operation of
the section.

The working of the section appears to be as follows:—
If any penalty is imposed, and any portion of it is paid to an injured workman, or distributed amongst the relatives of one killed, the portion of the penalty so paid or distributed is to be deducted from the amount of compensation awarded under the present Act. If, however, the action is decided before any proceedings for a penalty are taken, the workman is to recover his full compensation free of deductions; while in the case of the subsequent recovery of the penalty, the employer is to pay the full sum, and is not to be permitted to make any deduction with reference to the compensation he has already paid.

It is thus apparently to the advantage of the employer that proceedings for the penalty should be first taken;

(a) See Propositions V.-X., Chapter III., Part I., *ante*, 52-61.

though it must be borne in mind that this is only con- Chap. VI.
tingently for his advantage, since the distribution is
dependent on the exercise of a discretion by the Secretary
of State

In all these cases of the imposition of a penalty an action at common law in case of penalty being imposed.
action of damages for negligence lay, if it lay at all, apart
from the Employers Liability Act, 1880—notwithstanding
the penalty; for wherever the right existed independently
of the statute imposing the penalty, the penalty does not
take it away: (a) moreover, the neglect of the statutory
precaution, which occasions the liability to the penalty, is
itself some evidence of neglect of the employer's duty at
common law to take reasonable and unostentatious precautions.
There being an unqualified statutory obligation imposed
on a defendant, he cannot shift his responsibility for the
performance of the statutory duty on the shoulders of
another person (b)

Every action for recovery of compensation *must* be Action in County Court.
commenced in the County Court, and must be commenced
within six months from the occurrence of the accident
causing the injury. (c) The action may be ordered by the
High Court or a judge thereof to be removed into the High
Court, by a writ of *certiorari* or otherwise, if the High
Court or a judge thereof deem it desirable that the action
should be tried there, and upon such terms as to payment

(a) Proposition X, Chapter III, *ante*, 61

(b) *Groves v Lord Wimborne*, [1898] 2 Q. B. 402, dissenting from the
dictum of Lord Chelmsford, in *Wilson v. Merry*, L. R. 15 App. 326
at 341. See *Atkinson v. Newcastle and Gateshead Waterworks Co.*, L. R. 6
Ex. 401; *Conry v. Steel*, 3 E. & B. 402. *Bell v. Dalmeny Oil Co.*, 7 F.
787, under Coal Mines Regulation Act, 1897, s. 41, rule 21: statutory
duty to make "secure the roof and sides of every travelling road and
working place."

(c) S. 6, sub-s. (1). *Ante* 127. In the County Court an action is com-
menced on the day of entry of the plaint: C. C. Rules, 1908, Order V. r. 1.

Chap. VI. of costs, giving security or otherwise, as the High Court or a judge thereof shall think fit to impose. (a)

On horari

The practice under the provisions of the old County Court Acts was, that in the case of common law actions the removal was by the writ of *certiorari*, and in the case of equity actions or matters the removal was by order. Probably the consolidation of the Acts will make no alteration in the procedure.

Grounds for certiorari.

The grounds upon which the High Court or a judge may remove an action are in the section (b) stated to be that they "deem it desirable that the action" "shall be tried in the High Court." Consequently the reasons given may be as various as the cases removed. *Leques, L.J.*, in *Porter v. Great Western Colliery Company, Limited*, (c) specified three, viz:

- (1) Where difficult questions of law would probably arise at the trial of the action.
- (2) Where the character of the question raised, and the nature of the evidence in support of it was special, *e.g.* if a considerable amount of expert evidence had to be considered. (d)
- (3) Where the question in the action had previously come before the County Court judge, and a new trial had been granted.

All these considerations must be subject to the governing one, that this power of removal "was a jurisdiction

(a) 51 & 52 Vict c. 43, sec 126

(b) *Supra*.

(c) 10 T L R. 380

(d) The bare fact that there must be scientific evidence and witnesses is not sufficient. *Munday v Thames Ironworks and Shipbuilding Co*, 10 Q. B. D. 50, per *Manisty, J.*, at 61.

which ought under this Act to be exercised only in Chap. VI.
exceptional circumstances." (a)

To these must be added —

- (1) The probability of a fair trial not being obtainable in the County Court district from any special cause (b)

In connection with this last ground the power now possessed by the County Court judge to change the place of trial must be taken into account (c). This will form a very important element in determining the course to be taken where the objection is thereby to any particular County Court as the place for trial of the action.

Brett, M.R., (d) states the rule that should govern in England in deciding upon applications for the removal of action under the Act from the County Court to the High Court as follows:— "They are only to be allowed if some new question of law is raised, or some very difficult question in the particular case, for instance, as to the way in which the machinery caused the injury. The removal is in the discretion of the judge, and I should think that in his discretion he would, except in very peculiar circumstances, leave the case in the County Court."

This rule is identical with that laid down in the earlier case of *Munday v. Thames Ironworks and Shipbuilding Co.*, (e) where Manisty, J., doubted whether an action at common law could be consolidated with one under the Act;

(a) See also *Munday v. The Thames Ironworks and Shipbuilding Co.*, 10 Q. B. D. 39, where the writ of *certiorari* was refused.
(b) *Bates v. Warner*, 5 T. L. R. 582.
(c) 51 & 52 Vict. c. 41, s. 85.
(d) *The Queen v. Judge of City of London Court*, 14 Q. B. D. 905 at 907. As to the principles regulating the practice in Scotland, *McAvoy v. Young's Paraffin Light and Mineral Oil Co.*, 9 R. 100.
(e) 10 Q. B. D. 59.

Power to change the place of trial.

Rule as to removals stated by Brett, M.R., in *The Queen v. Judge of the City of London Court*.

Munday v. Thames Ironworks and Shipbuilding Co.

Chap. VI. since "the ordinary principle is that if there is a statutory proceeding for a particular cause of action and compensation is recovered, although limited in amount, an action at common law for large (a) damages shall not be maintained. If proceedings have been taken before a magistrate and a penalty or damages recovered, an action for the same cause cannot afterwards be brought" (b) This may be explained by considering *Morrison v. Baird* (c) in the Court of Session, where a distinction is pointed out between cumulative and mutually exclusive remedies. "I cannot conceive," says the Lord Justice-Clerk (Moncreiff), "that the Legislature ever intended that there should be both a common law and a statutory action. . . . The ground upon which the action is brought—the ground of liability—is a common law liability; and the only effect of the statute is, in the case of fellow-workmen, to take away a plea which might exclude such an action based upon the common law in the event of the wrong complained of having been done by a fellow-workman." Lord Young added: (d) "I agree with your Lordship that it is not incompetent to combine the common law and the provisions of the Employers Liability Act in the same action." (e)

Morrison v. Baird.

Difference between the Scotch and the English systems.

This manifestly means no more than that a workman is not to recover damages twice over for the same injury, though he may claim in the alternative. This, under the

(a) Probably this is a misprint for "larger."

(b) Cp. *Midland Ry. Co. v. Martin*, [1893] 2 Q. B. D. 172.

(c) 10 R. 271, 277. In *Magoo v. Dalghish*, 11 R. 857, an issue was approved which concluded with the words: "Damages laid at common law at £1000 or under the Employers Liability Act at 170 is"

(d) 10 R. 278.

(e) "The jury should be told by the presiding judge that their verdict should be as to one cause of action or the other, and that they cannot give judgment under both" per Madden, C.J., *Stephens v. Australasian Engineering Co.*, 27 V. L. R. 724, 728. The wording of this proposition wants modification to make it a correct statement of English law *Betts v. Dalmeny Oil Co.*, 7 F. 787.

Scotch system, in which the Sheriff Courts have unlimited jurisdiction, may readily be done. In England the County Court would not have jurisdiction beyond the £100 limit except under the Act; so that claims in the alternative would be to that extent hampered; though that does not constitute a reason why they should not be pursued so far as they may avail. Mausty, J., was probably thinking of the case of a plaintiff recovering under the Act, and then, with a view to secure larger damages, bringing his action at common law; in which case he would plainly be disentitled (a). If, however, he is to be understood as affirming that a workman may not frame his action in the alternative either under the Act or at common law, then the Act does not say so; and the general rule of law in the case of the existence of two remedies is otherwise (b). Does, then, the fact that simultaneous actions are brought in different courts make a difference? If it does, either or both of the actions would not be maintainable. A stay would be obtained with regard to the part common to the two actions. (c)

Again: if an action under the Act is brought and fails, can the plaintiff proceed anew at common law? For

Action at common law after failure of proceeding under the Act.

(a) See *Seddon v. Pittop*, 6 T. R. 1, per Gase, L. 601. "The only inquiry is whether the same cause of action has been brought and considered in the former action." 4 p. 330; see also *Hampton*, 11 Q. B. 111.

(b) *Hagot v. Boston*, 7 Ch. D. 1, *Metcalf v. Jones*, 10 T. L. R. 408, *Larhey v. Greenwood*, Times newspaper, Jan. 24, 1885, is a County Court action under the Employers Liability Act, 1880, removed into the High Court by *certiorari* to add a common law claim. *Marrow v. Plumby & Broughton Moor Coal and Fire Brick Co.*, 1895, 2 Q. B. 583, contained a common law claim as well as the claim under the Employers Liability Act, 1880 (per High, 1 J., 71, 601). In Scotland the practice is to schedule alternatively in the issue the sums claimed respectively at common law and under the Act. *Goudie v. Paul*, 23 R. 1. In *Duthie v. Caledonian Ry. Co.*, 25 R. 914, damages were recovered against one of two defendants, under the Employers Liability Act, 1880, and against the other at common law. Judgment was entered jointly and severally for £156, the limit under the Act, and against the other for the balance.

(c) *Morton v. Quick*, 26 W. R. 441.

Chap. VI. instance, an action against an employer fails through want of notice of action, and the plaintiff commences a common law action. Such action could be maintained on the principle laid down by Willes, J., in *Langmead v. Maple*: (a) "The conditions for the exclusion of jurisdiction on the ground of *res judicata* are that the same identical matter shall have come in question already in a court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been finally decided. . . . It is not sufficient to constitute *res judicata* that the matter has been determined on; it must appear that it was controverted as well as determined upon" (b). If an action is brought under the Act for the negligence of the master, and the plaintiff fails by the negligence alleged being disproved, on the same principle a common law action cannot be brought. If not proved, the ordinary rules relating to nonsuits would apply. There remains the case of an action brought at common law and failing, and subsequently an action commenced under the Act. This, too, seems referable to the ordinary principles relating to *res judicata*. But in every case said must have been complied with.

Application to
be made at
Chambers

Application for a *certiorari* must be made at Chambers and not to the Court (c). It may be made to a master, (d) but not to a district registrar (e). It is absolute in the first instance (f).

(a) 14 C. B. N. S. 270.

(b) "Although a declaration contains counts under which the plaintiff's whole demand might be recovered, yet, if no attempt has been made to give evidence of some of the claims, they may be recovered in another action. This was decided in *Sutton v. Tutop*, 6 T. R. 607, and that decision has been confirmed by subsequent cases in the King's Bench and Common Pleas." *Thorpe v. Cooper*, 5 Bing. 119, per Best, C. J., 129.

(c) *Bowen v. Evans*, 3 Ex. 111. (d) R. S. C. 1883, Order LIV. r. 12.

(e) R. S. C. 1883, Order XXXV. r. 6.

(f) *Hodding v. G. W. Ry. Co.*, 3 Jur. (N. S.) 1130.

If a *certiorari* be refused by the Court or a judge, no other judge may grant it. The applicant has an appeal from a judge to the Court, or may make a second application on different grounds. (a) Chap. VI.

Where a judge has declined to grant a *certiorari* the Court will not do so merely because it appears possible that a serious question of law may arise; since if it does, it may be reconsidered on appeal; nor because the decision, though involving directly only a small sum, may be of importance to the applicant as likely to affect other cases of a similar nature. (b)

In the affidavit made for use on the application care should be taken to set out all the material facts. In *Parker v. Bristol and Exeter Ry. Co.*, (c) where this was not done, the writ was set aside as improvidently issued. (d) On the other hand, where a *certiorari* had been issued by leave of a judge on an affidavit which stated generally that difficult questions would arise but did not state what they were, the Court refused to set the writ aside, as it did not appear that the particulars had not been pointed out to the judge at chambers. (e)

In *Walker v. Dunn*, (f) a *procedendo* was moved for on the ground that a *certiorari*, issued and directed to the Forest Court of Kamesborough, was not served till judgment had been signed. Holroyd, J., was of opinion that it is "a sound and wholesome general rule that a cause shall not

(a) 51 & 52 Vict. c. 43, s. 132.

(b) *Staples v. Accidental Death Insurance Co.*, 10 W. R. 59.

(c) 6 Ex. 184.

(d) "If the *certiorari* issued improvidently, we can order it to be superseded, and the return to be taken off the file" per Lord Mansfield, C.J., *Rex v. Wakefield*, 1 Bur. 155 at 450.

(e) *Golding v. Caudwell*, 2 L. M. & P. 175.

(f) 7 D. & R. 769. By 21 Jac. I. c. 23, s. 3, if a cause is sent back by *procedendo* to an inferior Court it is not again to be removed.

Chap. VI. be removed from an inferior jurisdiction after judgment has been signed there," and he thought "the rule particularly applicable where the defendant suffers judgment by default in the first instance, and then applies for a *certiorari*." The motion was allowed. (a)

Where case is tried with jury.

Where the case is tried with a jury, by 13 Eliz. c. 5, sec 2, the writ is to be delivered to the judge of the inferior Court at latest before any of the jury is sworn.

Certiorari in Ireland

The provisions for the removal of actions from the Civil Bill Court to the High Court of Justice in Ireland do not materially differ from those obtaining in England (b)

In allowing a *certiorari*, the practice in Ireland seems to lay a considerably greater stress on the amount sought to be recovered than is the practice in England (c)

Scottish procedure

By virtue of sec 9 of the Sheriff Courts (Scotland) Act, 1877, (d) any party to an action under the Employers Liability Act, 1880, may claim that the process shall be transferred to the Court of Session by a note in the process (of which the form is given in the section), lodged at any time before an interlocutor closing the process is pronounced in the action, or within six days after such an interlocutor is pronounced. The case is then to be set down and proceeded with before the Court of Session, as nearly as may be as if it had been raised in that Court. If the case has been improperly removed by the party ultimately successful, he shall recover only such costs he would have been entitled to if successful in the action in the Sheriff Court. (e)

(a) This rule was approved in *Kemp v. Balne*, 18 L. J. Q. B. 119, and in *Fox v. Veale*, 8 M. & W. 126.

(b) County Officers and Courts (Ireland) Act, 1877, 40 & 41 Vict. c. 56, ss. 57, 58.

(c) *Magoo v. Martin*, 16 Ir. L. T. 5.

(d) 40 & 41 Vict. c. 50.

(e) See *Murray v. Steel*, 12 B. 945.

The limitation on the right to appeal is not to apply to **Chap. VI.** any actions to which the procedure of the Act is applied.

In *Paton v. Niddrie and Benhar Coal Co.* (a) it was held that this section does not interfere with the right of either party under 6 Geo. IV, c. 120, sec. 10, having the cause removed to the Court of Session, with a view to a jury trial, after an order for proof has been pronounced, but this was doubted in *Kane v. Singer Manufacturing Co.* (b)

The power to try with assessors (c) does not appear to Assessors. have been resorted to, at any rate in any case with an available record.

The rules for procedure (d) are embodied in the County Rules of pro- Court rules, of which they form a part and are there to cedure be consulted.

Notice of action in respect of injury shall give:

Notice of
injury.

- (a) The name and address of the person injured.
- (b) Shall state in ordinary language—(1) the cause of the injury; (2) the date at which it was sustained.
- (c) Shall be served:
 - (a) If the employer is a private person, on him; or, if there is more than one, on one of them; and either (1) by delivering the same to the person on whom it is to be served, (2) by delivering it at his residence or place of business, (3) by posting it in a registered letter addressed to the person on whom it is to be served to his last-known place of residence or place of business;

(a) 12 R. 538

(b) 6 R. 658

(c) S. 6 (2). *Ante*, 127.

(d) S. 6 (3) *Ante*, 127. They are to be found in any County Court Practice.

(e) S. 7. *Ante*, 128. *McLeod v. Pirie*, 20 R. 381.

Chap. VI.

(β) If the employer is a body of persons corporate or unincorporate—(1) by delivering the notice at the office or any one of the offices of the body, (2) by sending it by post in a registered letter to the office or any one of the offices of the body

A notice is not to be deemed invalid "by reason of any defect or inaccuracy," (a) unless the defect or inaccuracy, in the opinion of the judge who tries the action, (1) prejudices the defendant in his defence, and (2) "was for the purpose of misleading." (b)

Moyle v.
Jenkins.

In *Moyle v. Jenkins* (c) the contention was that the requirements of sec. 1 (d) were satisfied by *verbal* notice; but

(a) In *Cartwright v. Drysdale*, 12 Q. B. D. 91, the omission of the date was held a "defect or inaccuracy" that did not render the notice invalid, and in *Stone v. Hyde*, 9 Q. B. D. 76, a letter from plaintiff's solicitor giving the date of injury, and stating that the plaintiff for some time past had been at a hospital under treatment "for injury to his foot" was held a mere "defect or inaccuracy," and not such an omission as to make the document "no notice at all." This was followed in *Co. v. Hamilton Sewer Pipe Co.*, 11 Q. B. R. 300, but subsequently the notice actions in the Ontario Act were directed. *Cassamuck v. Paul*, 21 Q. B. A. R. 719. In *Thompson v. Robertson*, 12 R. 121 a letter from the wife of the injured man in these terms was held sufficient: "I find I will need some more money and will you please oblige me with ten shilling. It is now five weeks since Adam got his accident. The jaw has been so badly smashed that he will never be the same man again. Adam has been advised to get damages from you." In *Heam v. Phillips*, 11 L. R. 475, notice of injury was served on the employer's son instead of on the employer. At the trial the judge, knowing that the father was in Court, made the amendment, and his order was upheld. The Divisional Court, however, intimated that had the objection been to the proper service of the notice they might have been constrained to a different decision. The notice need not refer to proposed litigation. *Hughes v. Blunt*, 1888, N. S. W. 5 W. N. 17. Notice addressed to a deceased employer is sufficient if it is shown that the notice has come to the hands of the trustee carrying on the business of the deceased. *Rathbone v. Ross*, 45 S. J. 238. In *Adams v. Nightingale*, 72 Law Times newspaper 421, delivery to a child was held not sufficient service, see *Forman v. Dukes*, Car. & M. 127, where the witness serving notice of injury did not know the handwriting of the plaintiff whose signature it purported to bear, but the notice was held sufficient if given on behalf of plaintiff.

(b) *Ante*, 120.

(c) 8 Q. B. D. 116.

(d) *Ante*, 126.

the Court held that, supposing that to be so if sec. 4 stood **Chap. VI** alone, yet it was so far affected by the terms of sec. 7 (a) as ^{Written notice essential.} to make a written notice necessary. The view was sustained by the Court of Appeal in the case of *Keen v. Millwall Dock Co* (b). Plaintiff's solicitor's letter referred to particulars "which have already been communicated to your superintendent." A verbal report had been made to the defendants' inspector, who took down the particulars. This was held insufficient. In this case Lord Coleridge, C.J., also expressed an opinion that a notice, to satisfy the Act, must be contained in one document. "If," he said, (c) "the letter relied on in this case had referred to some written document in which the nature and particulars of the injury were given, it would not, I should have thought, have been a compliance with the words of this enactment, which describes the notice as one and single, containing in it the incidents which the statute has required it to contain as a condition precedent to maintaining any action." The better opinion seems to be that this is not essential. "I agree," said Brett, L.J., (d) "that, as a general rule, the notice must be given in one notice, but I am not prepared to say it would be fatal if it were contained in more than one notice." Holker, L.J., concurred in this opinion.

In another case, (e) under sec. 261 of the Public Health Act, 1875, Lord Esher, M.R., with whom Bowen and Fry, L.JJ., concurred, definitely laid down that, "it is not necessary that the whole of a notice of action be set out in one document." So that unless some distinction can

Lamley v. Mayor, etc., of East Retford.

(a) *Id.*, 123.

(b) 8 Q. B. D. 182.

(c) *L. v. 184.*

(d) *L. v. 185.*

(e) *Lamley v. Mayor, etc. of East Retford*, 55 J. P., 188.

Chap. VI. be taken between the notice required under the Employers Liability Act, 1880, and that formerly required under the Public Health Act, 1875, it may be concluded that a valid notice of action can be collected from two or more documents.

In the notice it is not necessary to state the cause of action, but only that which will enable the employer to have substantial notice of what has occurred, so that he may make proper inquiries, and may come to trial prepared to meet the plaintiff's case. The provision that he shall state the "cause of injury" is not to be construed as a requirement that he shall state the "cause of action." (a)

Service of
notice.

With regard to the method of serving notice, there is an important decision of the First Division of the Court of Session, (b) on the point whether a notice sent by letter is good if the letter is not registered. Evidence was given that a letter not registered was posted and forwarded to the defenders, who, in answer to a further letter sent after the expiration of the six weeks, admitted its receipt, and stated that they had forwarded it to the secretary of an insurance company. The Lord President (Glasgow) said it was quite indispensable under the Act "that notice of an action should be served within six weeks, and, if it is not so served, the action is not maintainable. This is plain enough, but the point now to be considered is regarding the manner of serving the notice. The statute provides two modes in which it may be done, first, by 'delivering the same to or at the residence or place of business of the person on whom it is to be served.' That is plainly a notice by a 'delivered' letter, as distinguished from a posted letter. The second mode is 'by post by a registered

Judgment of the
Lord President
(Glasgow).

(a) *Clarkson v. Musgrave*, 9 Q. B. D. 386, 390.

(b) *McGowan v. Tancred*, 13 R. 1033.

letter'—that is to say, the pursuer may avail himself of the Post Office as a means of service, and that by means of a registered letter. The reason why the letter is to be registered is that the pursuer is not to be entitled to avail himself of the presumption of ordinary correspondence, that a letter, when posted, is presumed to have reached its destination unless it is returned from the Dead Letter Office. But if, in addition to posting the letter, the pursuer registers it, that, under the statute, creates a presumption that the letter will reach its destination. This is expressed by the last clause of the third paragraph of sec. 7 of the Act, which says, 'And in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered.' That clause will not preclude the defender proving, as matter of fact, that the letter did not reach him, just as little will it preclude the pursuer from proving that though the letter was not registered, it did, as matter of fact, reach the defender. Now, that has been proved as matter of fact here." (a)

What is evidence sufficient to act on of the receipt of a not registered letter was considered in *Previst v. Giatti*. (b) A letter was proved to have been posted on the 19th September; the six weeks expired on the 25th September. No proof of the receipt by the defendants was given, "but the defendants did not say, nor indeed were they asked by their counsel to say, when they did receive it." "Under these circumstances the judge decided that the defendants had received the notice on the 20th." On appeal the Divisional Court held there was evidence justifying his doing so. (c)

(a) Where service by post is dealt with in any Act subsequent to 1889, see the Interpretation Act, 1889 (52 & 53 Vict. c. 68), s. 26.

(b) 4 T. L. R. 487.

(c) Cf. the Interpretation Act, 1889 (52 & 53 Vict. c. 68), s. 26. This provision, however, only applies to Acts passed after 1st January, 1890.

Chap. VI.

Hetherington v
Kemp.

In *Hetherington v. Kemp* (a) evidence was given to show that a letter was written by a merchant in his counting-house, and put upon a table for the purpose of being taken and posted, and that by the course of business in the counting-house all letters deposited on the table were carried to the post-office by a porter. Lord Ellenborough ruled that this was not sufficient evidence of posting. "Some evidence must be given that the letter was taken from the table in the counting-house and put into the post office. Had you called the porter, and he had said that although he had no recollection of the letter in question, he invariably carried to the post office all the letters found upon the table, this might have done, but I cannot hold this general evidence of the course of business in the plaintiff's counting-house to be sufficient."

In *Skilbeck v. Garbett*, (b) the evidence was that letters were placed in a box in a room where witness was, and were taken from that box by the postman, who invariably called every day; and this was held sufficient evidence of posting.

Proof of actual
receipt of letter
not requisite.

Proof of the actual receipt of a letter, when proof has been given of its postage, never seems to have been required by English law. So far back as 1795 it was held in a bill of exchange case that the putting a letter into the post office to the indorser in proper time, informing him that the maker had not paid a note when due, is sufficient evidence of notice to the indorser (c). There is a *prima facie* proof on proving posting, and that the letter has not been returned by the post office,

(a) 4 Camp 193, 16 R. R. 773, *Trotter v. Maclean*, 13 Ch. D. 574 at 580. Cp. *Toosey v. Williams*, M. & M. 129, *Rowland v. De Vecchi*, 1 C. & E. 10.

(b) 7 Q. B. 846.

(c) *Saunderson v. Judge*, 2 H. Bl. 509, 3 R. R. 492.

that the letter has reached its destination; (a) and a conclusive presumption that it arrived at its destination at the hour it would be delivered in the ordinary course of postal business. (b) Chap. VI.

It is not sufficient if a letter is directed generally to a general address, person in a large town, as "Mr. Haynes, Bristol," an address which Abbott, C.J., held was not definite enough to warrant a presumption that it reached the person designated. (c)

His Honour Judge Rieggs in a note to the 7th edition of his work on Workman's Compensation, (d) says "In one case," which he does not further identify, "a solicitor who had omitted to give notice by registered letter was sued by his client for negligence, and had to pay a considerable sum as damages and costs." On these facts the decision must have been wrong, as the Act provides for delivery of the notice otherwise than by registered letter "at the residence or place of business of the person on whom it [the letter] has to be served", and adopting a method provided by Act of Parliament cannot *per se* be negligence; though it may plainly be done in a negligent way.

An employer under the Act includes a body of persons corporate or unincorporate. (e) Employer includes corporation.

(a) *Wainwright v. Wainwright*, 1 C. M. & R. 240

(b) *St. Laurent v. Collin*, 7 M. & W. 513. *Dunlop v. Hoag*, 11 H. L. C. 381. As to special message, *Macgregor v. Kelly*, 11 N. 791. *Cp. Reed v. Harvey* (1880), 5 Q. B. D. 484.

(c) *Waller v. Haynes*, 17 & M. 149, but *cp. Byrne v. C. Barton*, 17 Q. B. 823, where a bill was drawn dated "London" but not otherwise giving the address of the drawer. Notice of dishonour of the bill was given subsequently in a letter addressed to the drawer "London." As this was addressed in the same way that the bill was drawn, it was held evidence on which a jury might find that due notice had been used to give notice of dishonour.

(d) At p. 74. The case of *Piers v. Lovatt*, cited at p. 82 of the same work, also presents no difficulty. *see the cases supra.*

(e) S. 8. *Ante*, 129. Under the existing Act no action can be

Chap. VI.

Workman. (a)

Workman (*b*) is defined to mean "a railway servant and any person to whom the Employers and Workmen Act, 1875, (*c*) applies."

Railway servants.

It has been suggested that the term "railway servant" comprehends every servant of a railway. It is at least doubtful whether in an Act whose object is "to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service," and in which "railway servant" is used in collaboration with workmen, those servants of a railway would be included to whom its provisions are not otherwise applicable (*d*). The spirit of an Act of Parliament is not to be sacrificed to the pedantry of verbal logic: *Qui horret in litera horet in cortice*. (*e*)

Employers and Workmen Act, 1875.

By sec. 10 of the Employers and Workmen Act, 1875, (*f*) "the expression workman does not include a domestic or menial servant, but . . . means any person who, being a labourer, (*g*) servant in husbandry, (*h*) journeyman, (*i*) artificer, (*k*) handicraftsman, (*l*) miner, (*m*) or otherwise

maintained against the representatives of a deceased employee. *Gibbs v. Fairbank*, 8 T. L. R. 618. Cp. a curious American case, *King v. Henkle*, 60 Am. R. 119. As to the operation of the maxim *Ad totum personam monitor eum persona, ante*, 101, also see *Martin v. Baltimore Rd. Co.*, 151 U. S. (44 Davis) 673.

(a) *Ante*, 121.

(b) S. 8. *Ante*, 129.

(c) 38 & 39 Vict. c. 90.

(d) *Gordon v. Jennings*, 9 Q. B. D. 45.

(e) *Eyeten v. Studd*, Plowd. 467. The point is concluded by *Simpson v. Elbow Vale Steel, etc. Co.*, [1905] 1 K. B. 453, followed in *Bagnall v. Levinstein*, [1907] 1 K. B. 631.

(f) 38 & 39 Vict. c. 90.

(g) *Post*, 268.

(k) *Post*, 274.

(i) *Post*, 274.

(l) *Post*, 275.

(m) *Post*, 276.

engaged in manual labour, (a) whether under the age of twenty-one or above that age, *b*) has entered into or works under a contract with an employer, (c) whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service (d) or a contract personally to execute any work or labour "

By s. 13 "this Act shall not apply to seamen or apprentices to the sea service " (e)

By the Interpretation Act, 1889, (f) words importing the masculine gender shall include females, unless a contrary intention appears Women included.

Domestic and menial servants are not within the Act

A "domestic servant" is one who in ordinary circumstances resides in the master's house; but this test is not conclusive (g). The determination of whether a servant is a menial servant or not is a question of the facts in each particular case. (h)

Domestic servants not within the Act.

A menial servant is a somewhat more extensive term. Thus, a local gardener, living outside the house, but upon the property, has been held to be a menial, though not a

Menial servant

(a) *Post*, 277. As to manual labour, *McLeod v. Paine*, 21 R. 381. "For woman of a household" was held not a description such as to convey to the Court knowledge of one way or another as to the class or proportion of manual labour in the occupation. *McLeod v. Paine*, 17 R. 736.

(b) *Post*, 280.

(c) *Post*, 280, 281.

(d) *Post*, 288.

(e) In *Oakes v. Midland Iron Co.*, 11 R. 579, a servant employed on board a vessel solely used on a canal was held not to be a seaman. In *Fry v. Balmum Steam Ferry Co.*, 7 N. S. W. R. (Law) 146, an engineer of a steam ferry boat was held not within the Act as not ordinarily engaged in manual labour. In *Corbett v. Pearce*, 20 T. L. R. 473, a man engaged navigating a barge on the Thames which might be used for coasting purposes was held a seaman. "Seaman" is defined by Merchant Shipping Act, 1904 (57 & 58 Vict. c. 60), s. 742. Cp. *The Ruby* (No. 2), [1898] P. 59.

(f) 53 & 58 Vict. c. 63, s. 1, sub-s. 2.

(g) *Graham v. Thomson*, 1 Shaw, 809.

(h) *Lawlor v. Landon, Jr.*, 10 C. L. 188.

Chap. VI. domestic servant (*a*) Domestic servants are those occupied in the service of the master's house; menial (*b*) servants those engaged on the establishment. Servants in either of these classes are, by the exception in the definition, taken out of the operation of the Act; were this not so, they would come within it as labourers.

Labourer.

"Labourer." (*c*)—"A labourer" is a man who digs and does other work of that kind with his hands. (*d*) Parke, B.'s definition (*e*) is, those who "enter into a contract to employ their *personal* services, and to receive payment for that service in *wages*."

Manual labour
and manual
work dis-
tinguished

To bring a person within the section it is further necessary that he should be engaged in "manual labour." The distinction between this and "manual work" is pointed out by Smith, J., in *Cook v. North Metropolitan Tramways Co.* (*f*) "The expression used" in the Act, he says, "it should be noted, is not 'manual work,' but 'manual labour,' for many occupations involve the former but not the latter, such as telegraph clerks, and all persons engaged in writing. I cannot see the distinction between driving and other occupations which involve no manual labour, though they do involve manual work."

In *The Queen v. Wortley*, (*g*) a case under the Stamp Act, with reference to the non-stamping of an agreement,

(*a*) *Nowlan v. Aldrich*, 2 L. M. & C. 54. In *Isaiah a servant* and gardener was held not to be "a manual servant." *Morgan v. Burt*, 12 L. Q. B. 198. In *Snell v. Tivies*, 13 L. J. C. P. 251, a huntsman was held a menial servant. Cp. *Ogle v. Morgan*, 1 The Q. B. 853, *Vaughan v. Booth*, 16 Jor. 809.

(*b*) *Saxon words or in use*—one of a household. *Skate, Flynn Diet*, sub voce, Menial.

(*c*) *Ante*, 266.

(*d*) Per Brett, M.R., *Morgan v. London General Omnibus Co.*, 53 L. J. Q. B. 352.

(*e*) *Haley v. Warden*, 2 F.T.R. 59 at 63.

(*f*) 18 Q. B. D. 683 at 684.

(*g*) 21 L. J. M. C. 44.

which was contended to be within the exemption for the hire of a labourer, Lord Campbell saw no reason "for confining the meaning of the word 'labourer' to a mere hedger and ditcher", and the Court held that a man engaged to take charge of glebe land at £25 a year and a third of the clear annual profit after all expenses of rent, rates, labour and interest of capital were paid, was not a "menial servant" but a "labourer." On a similar point arising in *Wilson v. Zuheta, ex parte Eale, J.*, said, "No man would doubt that a stoker hired to work an engine on land would be a labourer, whether the engine were moveable or not; and it would make no difference that the engine were one moveable on water, the stoker would not for that reason cease to be a labourer." He adds later on in his judgment "It is a matter of common knowledge that words in one Act of Parliament may have a meaning which they would not have in another; and I do not mean to say that the plaintiff might not, under some other Act of Parliament, be subject to liabilities as a manner."

Chap. VI

Eale, J., comment

Firemen and engineers on steamers of every kind are decided to be outside the Employers Liability Act of New South Wales. (*b*)

Firemen and engineers.

The foreman of a gang of labourers engaged on a ship in stowing bales of wool, and whose work was to unhook the bales as they were brought to them to the hatchway by means of a steam crane, and then to throw them down into the hold, has been held to be himself a labourer (*c*)

Foreman of labourers.

In *Wilson v. Glasgow Tramway Co.*, (*d*) under the

Tramway & omnibus conductors.

(a) 11 Q. B. 405, per L. J., at 415

(b) 51 Vict., No. 8, *Frey v. Bulmer Steam Ferry Co.*, 7 N. S. W. R. (Law) 146.

(c) *Kilhard v. Rooke*, 19 Q. B. D. 585, 21 Q. B. D. 967. So has a "hatch mouth man" *Falconer v. McCabe*, 3 F. 10.

(d) 5 R. 981

Chap. VI. Employers and Workmen Act, 1875, a decision previous to the passing of the Employers Liability Act, a tramway conductor was held "not other than a labourer employed to attend on the tramway cars as much so as a miner employed to work a windlass or the gearing of a pit, or a man engaged to drive the horses of a trackboat on a canal" (a). This is inconsistent with *Morgan v. London General Omnibus Co.* (b) in the English Court of Appeal, where an omnibus conductor was held not to be a labourer within the definition; since "his real and substantial business is to invite persons to enter the omnibus and to take and keep for his employers the money paid by the passengers as their fares. In fact, he earns the wages becoming due to him through the confidence reposed in his honesty." (c). In *Cook v. North Metropolitan Tramways Co.* (d) the driver of a tramcar was held to be excluded from the benefit of the Act because the expression used is "manual labour" and not "manual work"—that is, work apart from the necessity of thought and skill. On the other hand, the plaintiff in *Vernon v. Franco* (e) was held to be within the definition of "workman" in the Employers and Workmen Act, 1875. "He is," said Lord Esher, M.R., (f) "a man who drives a horse and trolley for a wharfinger. We must take into account what his ordinary duty was. He has to load and unload the trolley. That is manual labour. His duty may be compared to that of a lighterman who conducts a barge or lighter up and down the river. The driving the

Wilson v.
Glasgow
Tramway Co.

Morgan v.
London General
Omnibus Co.

Cook v. North
Metropolitan
Tramways Co.

(a) *L. c.*, per Lord Justice-Clerk. *Moucroff*, 988.

(b) 12 Q. B. D. 201; 13 Q. B. D. 532.

(c) *L. c.*, per Brett, M.R., 834.

(d) 18 Q. B. D. 683; but in *Smith v. Associated Omnibus Co.*, [1907] 1 K. B. 918, the driver of a motor omnibus was held to be a person "otherwise engaged in manual labour," and entitled to the benefit of the Act.

(e) 19 Q. B. D. 647. See *Leech v. Garbide*, 1 T. L. R. 391.

(f) 19 Q. B. D., per Lord Esher, M.R., 651.

horse and trolley and the navigating of the lighter form the easiest part of the work, his real labour, that which tests his muscles and his sinews, is the leading and unloading of the trolley or the lighter" Chap. VI.

The inquiry in these cases is mainly one of fact, that is, whether the duties in any case performed are mainly manual or mainly mental. The question was again brought before the Court of Appeal in *Bond v. Lawrence*, (a) in the case of a grocer's assistant, when the test applicable was determined to be an inquiry what is "the nature of the substantial employment" unaffected by consideration of "matters that are incidental and accessory." (b) In an earlier case (c) to the same effect, *Day, J.*, had said (d) "Every one knows the difference in degrees of labour. For instance, no one would think of requiring a stud groom to groom cart horses, or a groom of the chambers or a butler to clean his boots. Here the respondents bound themselves to employ the appellant, not in merely mechanical work, but in a higher class of labour, viz. developing ideas originating with his employers or inventing and carrying out ideas and suggestions of his own in furtherance of the business of the firm." The conclusion was that the appellant was not within the Act. The driver of a motor omnibus is a workman. (e)

In *Hunt v. G. N. Ry. Co.*, (f) *Pollock, B.*, excluded an occasional resort to manual labour as sufficient to make Hunt v. G. N. Ry. Co.

(a) [1892] 1 Q. B. 226.

(b) [1892] 1 Q. B., per Fry, L. J., 229.

(c) *Jackson v. Hill*, 13 Q. B. D. 618.

(d) *L. c.* 621.

(e) *Smith v. Associated Omnibus Co.*, 23 T. L. R. 381.

(f) [1891] 1 Q. B. 601. The workman in question happened to be a railway servant, so that the case is not directly an authority under the Employers' Liability Act, 1880. *Lamb v. G. N. Ry. Co.*, [1891] 2 Q. B. 261, note at 282.

Chap VI. a "person engaged in manual labour": for such a man's "primary duty was to use his intelligence, not his hands." In *Regina v. Leath Justices*, (a) a hairdresser was held not a workman engaged in manual labour. But in *Maynard v. Peter Robinson* (b) a worker with a sewing machine who also ironed materials was held to be engaged in manual labour; as also was one who though called a stage manager was employed to shift scenery and furniture (c)

Labourer. The term "labourer," under 20 Geo. II. c. 19, has been held to extend to labourers of all descriptions; as, for instance, to a labourer who had contracted to dig and stem a well for cattle, to be paid for by the foot, and who employed another to assist him in the work, (d) though not to a caretaker (e) of goods seized under a *fi fa*. It does not apply to "a carpenter, a bailiff, nor the clerk of a parish" (f)

Contractor. A contractor for work is not a workman or labourer; thus, where one took a contract to execute work on a railway at a certain sum per cubic yard, and employed other men to assist him in the work, he was held not to be a workman or labourer (g)

This was affirmed in the Exchequer Chamber (h) on the ground that the Truck Act, (i) under which this and the preceding case were determined, "was not designed for the protection of persons taking contracts for labour to be

(a) [1900] 2 L. R. 711, *Hoate v. Robert Green, Ltd.*, [1907] 2 K. B. 315.

(b) 19 T. L. R. 492.

(c) *Rushbrook v. Grimsby Palace Theatre*, 21 T. L. R. 617.

(d) *Lowther v. Earl of Radnor*, 8 East 113.

(e) *Branwell v. Pennock*, 7 B. & C. 536.

(f) *Morgan v. London General Omnibus Co.*, 13 Q. B. D., per Brett, M. R., 833.

(g) *Riley v. Warden*, 2 Ex. 59.

(h) *Loggan v. Barnes*, 7 E. & B. 115 at 131.

(i) 1 & 2 Will. IV. c. 87, s. 8.

done by others, persons who speculate upon the state of the labour market"; and that "when the procuring work to be done by the hands of others comprehends the whole of what a man contracts for, the circumstance of his doing some portion of the work himself does not bring him within the statute - there must be a contract by which he binds himself to do it" "When we look at the provisions of the Act," says Macdonald, *l.c.* "it seems to be clear that the Legislature intended to protect only labourers, not what are commonly called contractors."

Chap. VI.

"Servant in husbandry," *ib.* — A "servant in husbandry" ^{Servant in husbandry} does not refer merely to persons engaged in tilling and sowing land or in other acts connected with the production of crops, but includes all servants employed upon a farm where, by the terms of their contract of service, bound to make themselves useful in its management.

This definition, which was intended to meet the case of a bailiff or superintendent on a farm, must be limited by the words "*employed in manual labour*" (*c.*).

A waggoner who during the harvest worked in the harvest field generally was held a "servant in husbandry;" ^{waggoner working in harvest field.} and there was held to be *some evidence* (*d.*) to justify a similar finding where a female servant acted as dailymaid and assisted in harvest work, but also assisted in the cooking and in making the beds of the household (*e.*) In Scotland a kitchen ^{woman.} servant engaged by a farmer to act as "kitchen woman"

(a) 7 C. & D. at 135.

(b) *Ibid.*, 265.

(c) Per Bovill, *arguendo*, Davies v. Lord Berwick, 1 E. & L. 519 at 551.

(d) *Lilley v. Elwin*, 11 Q. B. 742.

(e) *Ex parte Hughes*, 29 L. J. M. C. 198.

B.E.L.

Chap. VI. and bye woman" was included amongst "servants in husbandry" (a)

Meaning of
Brett, M R

Brett, M R, (b) says "A man employed to dig the ground is a 'servant in husbandry.'" This statement, however, must be taken with obvious reservations; otherwise it would include a grave-digger and a navvy; both of whom are included in other terms of the definition.

Journeyman

"Journeyman"—"Etymologically considered," says Day, J, (c) "a journeyman is one employed by the day, but that is not in the sense in which the term is ordinarily used, for, in most trades where journeymen are employed—hatchers, bakers and tailors, for instance,—they are hired and paid by the week." In the Court of Appeal, in the same case, (d) Brett, M R, defines a "journeyman" as "a man who is working for a master, such as a carpenter"

Distinction
between, and
labourer.

"Artificers, handicraftsmen, miners, etc., do not necessarily or properly fall under the denomination of *labourers*, there being, as I take it," says Lord Ellenborough, (e) "a known distinction between a journeyman in any art, trade, or mystery, or other workmen employed in the different branches of it, and a *labourer*"

Artificer.

"Artificer"—"An '*artificer*,'" says Brett, L. J. (f) "is a skilled workman, and a 'handicraftsman' is the same" To this must be added the qualification, "engaged in manual labour." "The party to be an artificer," says Jervis, C. J., (g)

(a) Clarke v. McNaught, Aikley, 33.

(b) Morgan v. London General Omnibus Co., 13 Q. B. D. 832 at 834.

(c) Ibid. 12 Q. B. D. 201 at 206.

(d) 53 L. J. Q. B. 352 at 353. This sentence does not appear in the Law Reports.

(e) Lowther v. Earl of Radnor, 9 East 113 at 124.

(f) Morgan v. London General Omnibus Co., 13 Q. B. D. 832.

(g) Sharnan v. Sanders, 22 L. J. C. P. 86; approved in the Ex. Ch., Ingram v. Barnes, 7 E. & B. 115 at 132.

"must be a person who is to have the personal performance of some work for which he is to be paid wages, and this must be with reference to the original contract or obligation"

Chap. VI.

"I cannot conceive," says Williams, J., (a) "that the word 'artificer' only applies to persons engaged in such occupations as require *manu* (b) manual labour." The term was applied in the case from which the above quotation is taken to a designer of patterns for a cubic painter. It has also been applied to a working tailor engaged to make clothes as he should be required, each garment to be paid for according to a price list; (c) to a stuff presser or stuff finisher of Italian goods, working manually at weekly wages and a commission, and besides, superintending other workmen (d), to a framework knitter who manufactured stockings, (e) and, under the Stamp Acts, to an overseer in a printing office (f).

To constitute an artificer there must be an agreement to work personally, (g) but the fact of having assistants does not disqualify, nor yet that the work they do is piece-work, (h).

"Handicraftsmen"—By the Workshop Regulation Act, 1867, (i) handicraft shall mean "any manual labour exercised by way of trade or for purposes of gain or incidental to the making any article or part of an article, or in or

(a) *Ex parte Ormrod*, 1 Dow. & L. 827.

(b) In 13 L. J. M. C. 73 the word used is "to it."

(c) *Ex parte Giddons*, 25 L. J. M. C. 12.

(d) *Wheatley v. Ainslie*, 13 W. R. 144.

(e) *Moorhouse v. Lee*, 4 F. & F. 351.

(f) *Bishop v. Lewis*, 1 F. & F. 401.

(g) *Weaver v. Lloyd*, 21 L. J. Q. B. 151.

(h) *Bowers v. Lovekin*, 25 L. J. Q. B. 371.

(i) 30 & 31 Vict. c. 146, s. 4, repealed by 41 Vict. c. 16, sch. 6.

Chap. VI. incidental to the altering, repairing, ornamenting, finishing or otherwise adapting for sale any article "

Making straw-plait is a handicraft. (a)

Iron rivetters—"angle-iron smiths and platers"—paid at the rate of £5 a ton for the work executed, with liberty to employ other workmen of inferior skill to themselves, "were clearly handicraftsmen" within 1 Geo. IV. c. 31, sec. 3. (b)

A person who contracted to weave certain pieces of silk goods for another at certain prices has been held not to be "an artificer or handicraftsman" or "other person" within 4 Geo. IV. c. 31, sec. 3. (c)

An overlooker of looms, who also does small repairs and puts the wimp on, is a handicraftsman." (d)

Miner. "Miner"—This word covers persons in the employ of "batty-men" who enter into a contract with the owners of the mine to get coal, and are injured by others engaged in the same system of work. (e)

The term "miner" would appear to include all workers at underground excavations employed to dig out minerals.

"The term," say Messrs. Spens and Younger, (f) "would not apply to a pithead man, but the latter would be embraced, if not under any other category, in that of 'otherwise engaged in manual labour.'"

(a) *Bendon v. Parrott*, L. R. 6 Q. B. 718.

(b) *Lawrence v. Todd*, 32 L. J. M. C. 238.

(c) *Hardy v. Ryle*, 9 B. & C. 603.

(d) *Leech v. Gattade*, 1 T. L. R. 391.

(e) *Brown v. Butterley Coal Co.*, 2 T. L. R. 159, *Morrison v. Baird*, 10 R. 271 at 280. Cf. *Marlow v. Flimby & Broughton Moor Coal and Fire Brick Co.*, [1898] 2 Q. B. 588, *Fitzpatrick v. Evans*, [1902] 1 K. B. 605; and see *Johnson v. Lindsay*, [1891] A. C. 371.

(f) *Employers and Employed*, 140.

A quarry is distinguished from a mine as being "a place upon or above and not under ground." (a) Quarrymen, if not held to be miners within the contemplation of the Act, (b) would yet be within it as "otherwise engaged in manual labour", which has been expounded by Brett, M.R., (c) to mean "any person engaged in the same way as all the others are engaged, although they do not go by the same names." (d)

"Otherwise engaged in manual labour" (e) — A man engaged as "a potter's painter, overlooker and mixer," assisted in his work by "transferrers" whom he himself engaged and paid, is a workman "engaged in manual labour," notwithstanding that for the sake of speed and convenience he paid for manual assistance. (f)

Men were engaged to load a ship. It was the duty of one of them to guide the beam of a crane used in the loading with a guy rope, and to give directions when to lower or hoist the rhum. He was "engaged in manual labour." (g)

A slater, paid by the piece and not bound to do the work personally, but, as a matter of fact, working himself at the time when he received the injury complained of, was found by the County Court judge to be a workman, and the

(a) Per Turner, L.J., *Bell v. Wilson*, 10 R. 1 Ch. 303.

(b) *Duvonchue v. Rawlinson*, 28 J. P. 72.

(c) *Morgan v. London General Omnibus Co.* 53 L. J. Q. B. 353.

(d) As to "a contract personally to execute any work or labour," see *Saunders v. Hendock*, 4 E. & B. 570.

(e) See under "Labourer," *ante*, 268. For the meanings of "otherwise" see *Stroud*, *Find. De. sub voce*. Generally when following an enumeration it should receive an *opis eum generis* interpretation, much in the same way as "other," *q. v. l. c.* See also *In re Clark, ex parte Schultz*, [1898], 2 Q. B. 330.

(f) *Glainger v. Aynsley*, 6 Q. B. D. 182.

(g) *Shaffers v. General Steam Navigation Co.*, 10 Q. B. D. 356.

Chap. VI. Divisional Court refused to disturb the finding, holding that there was evidence in support of it (a)

But, under the Truck Act, a labouring man who entered into a written contract with a railway contractor to make as many bricks as the contractor required, taking the clay and finding all labour in preparing it, while the railway contractor supplied the materials and paid so much a thousand for the finished bricks, was held not to be a workman; because there was no contract binding him to do the work personally. (b)

Test.

The question is, whether the workman who did work with his own hands in performance of the contract was absolutely bound by the terms of the contract so to do (c)

The reason for the discrepancy between *Stuart v. Evans* and the law as declared in the earlier cases may be that the Divisional Court in that case had only to find whether there was any evidence that could possibly sustain the County Court judge's decision. It may also be that the judges in *Ingram v. Barnes* saw "good reason for not extending the Act beyond its apparent meaning" (d), while the interpretation put by many judges on the Employers Liability Act, 1880, has been distinctly benignant.

Engineer not engaged in manual labour.

The New South Wales case of *Froy v. The Balmain*

(a) *Stuart v. Evans*, 49 L. T. (N. S.) 138, *cp. Riley v. Warden*, 2 L. R. 59, and *Weaver v. Lloyd*, 21 L. J. Q. B. 161, holding that to make a man an artificer within the Truck Act it is not enough that he is at liberty to work personally, but that he must be bound to do so.

(b) *Ingram v. Barnes*, 7 L. & B. 115 in F. & C. 132, was followed in *Squire v. Midland Loco Co.*, 21 T. L. R. 186, where it was held that "loco shippers" are not workmen within s. 10 of the Employers and Workmen Act, 1875, and therefore not within the Truck Act, 1880. See also to the same effect *Sleeman v. Barrett*, 2 H. & C. 934, and *Sharman v. Sanders*, 22 L. J. C. P. 86.

(c) See per Lord Campbell, C. J., at 124.

(d) Per Bramwell, B., 7 E. & B. 189.

Steam Ferry Co. (a) is in accordance with the principle enunciated. An engineer on board a steam ferry boat running within Sydney harbour was held not a workman, because not engaged in manual labour. Martin, C.J., lays stress on the point that though the engineer had to do manual labour in the course of his daily round, yet, as this was not the substantial portion of his employment and no more than auxiliary, he is not within the section. But in *Isaacson v. New Grand Clapham Junction* (b) the County Court judge having ruled that an engineer engaged in looking after electric lighting plant was not a workman, a new trial was granted.

In a New South Wales case (c) plaintiff, being the owner of a compo of carts, went, when it suited him, to the brick-kiln of the defendants, and took bricks away to the places on the defendants' works where they were required, for which he received a specified sum of money. He was not bound to do the work, though, if he thought fit to do it, he was paid. While the plaintiff was loading, the roof of the kiln fell in, and he was injured; for which injuries he sued under the Act, claiming under the words a "contract of service or a contract personally to execute any work or labour." The Supreme Court held him disentitled to recover, because a contract to be within the words must be a contract to personally serve or to serve for some period or to do some particular work. "It seems to me that the contract

(a) 7 N. S. W. R. (East) 118. The definition of workman is, so far as this case goes, identical with that in the English Act. In *Hanson v. The Australasian Steam Navigation Co.*, 5 N. S. W. R. (East) 117, the question was whether a "seaman" was within the then New South Wales Act. The Court held that he was not, because the words "*otherwise engaged in manual labour*" must be limited to labour of a similar kind to that before enumerated. See now 55 Vict. No. 6 N. S. W.

(b) 19 T. L. R. 150.

(c) *Lobb v. Amos*, 7 N. S. W. R. (Law) 92.

Chap. VI. must be for the personal doing of the work by the plaintiff who brings an action of this sort." (a)

Infants' Contracts (b)

Prima facie an infant is incapable of contracting. To this rule there is "an exception which is based on the desirableness of infants employing themselves in labour, therefore where you get a contract for labour, and you have a remuneration of wages, that contract, I think, must be taken to be *prima facie* binding upon an infant." (c) If viewed as a whole the contract is an unfair one, it is void (d). Thus a contract by a boy of thirteen with a railway company that, in consideration of their employing him on reduced terms he will surrender all right to any compensation for injury arising through their default, is so prejudicial to the boy as not to be binding on him (e). While a contract not to sue in respect of injuries arising from accident in consideration of advantages obtained from membership of an insurance society, is valid as being for the benefit of the infant (f).

Works under
a contract

"It seems to me that the words 'or works under a contract with an employer' were inserted into the section to meet the case of a workman who has not contracted directly with an employer, but has been engaged by an agent of the

(a) *L. v.*, per Sir James Martin, C.J., 96

(b) *Ante*, 257

(c) Per Fry, L.J., in *De Francesco v. Barnum*, 15 Ch. D. 180 at 189

(d) *Condon v. Matthews*, [1893] 1 Q. B. 311. In *Green v. Thompson*, [1893] 2 Q. B. 1, too, is explained by Channell, J., at 6. "The true question is whether the particular stipulation complained of is so unfair as to make the entire contract disadvantageous to the infant. You may find in any contract a clause which by itself is not to the advantage of the infant, but that is not enough: the contract as a whole must be disadvantageous."

(e) *Flower v. L. & N.-W. Ry. Co.*, [1894] 2 Q. B. 65.

(f) *Clements v. L. & N.-W. Ry. Co.*, [1894] 2 Q. B. 482.

employer to work for the employer—*induced* by a butty-
man or a ganger - or to meet the case of an apprentice or
other similar cases." (a) Chap. VI.

The definition of "employer" is found in sec. 8, (b) and Employer.
has already been considered in detail with the collateral
law bearing on it

At common law the result of finding the employer is,
with certain exceptions, (c) to find a person against whom
an action cannot successfully be brought. Under the
Employers Liability Act, 1880, an action can be brought
against no one except the employer

But no action will be against the representatives of a deceased
employer for personal injuries sustained by a
workman. (d)

Neither probably could a workman recover against an infant
infant employer. The rule of the common law is that
whenever the substantive ground of an action against an
infant is contract, the infant is not liable, even though the
contract is averred merely as inducement to a supposed
tort. (e) Thus, an infant would be liable for any injury
directly inflicted by him, for example, if he were working
with another and negligently struck him, the infant would
be liable to make compensation for the effects of the blow.

(a) Per Smith, L. J., *Marrow v. Whimble and Broughton Mew Co., Ltd.* and
Frederick & Co., Ltd., 1888, 9 Q. B. 585 at 597

(b) *Id.*, 129

(c) As to which see ante, 19 et seq.

(d) *Gillet v. Fairbank*, 2 T. L. R. 618. Mr. Russell says (Employer's
Liability and Workmen's Compensation (7th ed.), 119) that it was decided
by the Court of Appeal in *McCarthy v. Jacob & Nicholson* and which
he does not further identify, that if a plaintiff in an action under the
Employers Liability Act die after action commenced but before judgment,
the action abates. Any right of action under Lord Campbell's Act is a
different action, and must be prosecuted separately.

(e) *Jennings v. Randall*, 8 T. R. 335, *Burnard v. Haggis*, 14 C. B.
(N. S.) 45. The decisions are discussed in *Walley v. Holt*, 85 L. T. (N. S.)
681. *Salmond, Law of Torts*, 58-60, digests the principles.

Chap. VI. He would not be liable for an injury caused by the negligence of those in his service; for the negligence could not be established except by reason of violating a contract which the infant might treat as void. (*a*)

Lunatic. A lunatic employer is liable unless he can prove not only his incapacity to make the contract out of which the claim against him arises, but in addition the plaintiff's knowledge of his incapacity. (*b*)

Crown A servant of the Crown, acting on behalf of the Crown, is not liable as an employer, since no action lies against a public servant upon any contract which he makes in that capacity. (*c*)

The Crown is not liable as an employer within this definition:

- (1) Because the rights of the Crown are not affected by an Act in which the Crown is not specially named; (*d*)
- (2) Because the Crown is not liable for the torts of its servants. (*e*)

(*a*) *Cp. Lovell & Christmas v. Beauchamp*, [1894] A. C. 607, citing *Whittingham v. Hill*, Cro. Jac. 494, for the proposition that an infant trader is not liable for goods supplied to carry on a trade with.

(*b*) *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599. See Salmond, *Law of Torts*, 61.

(*c*) *Dunn v. Macdonald*, [1897] 1 Q. B. 555. But for exceptions of certain officers who are liable to be treated as agents of the Crown, but with a power of contracting as principals, see *Graham v. Public Works Commissioners*, [1901] 2 K. B. 781, and particularly per Phillimore, J., at 790, also at 791. "I think that they have a general liability to be sued for the purposes of obtaining a decision, although, of course, no execution can go against them because their property . . . is Crown property."

(*d*) *Bac. Abr. Prerog.* (E.) 5. The learning on this principle of law is fully set forth in *Craies on Statutes* (4th ed.), 360-368.

(*e*) *Johnstone v. Sutton*, 1 E. R. 498, *Buron v. Deuman*, 2 Ex. 167; *Raleigh v. Goschen*, [1896] 1 Q. B. 78.

Government Dockyards Compensation.

Chap VI.

A system of compensation prevails in the Government dockyards by virtue of a Treasury minute, made under the Superannuation Act, 1887 (*a*), sec. 1 of which provides that : —

- (1) Where a person employed in the Civil Service of the State is injured —
 - (a) In the actual discharge of his duty, and
 - (b) Without his own default, and
 - (c) By some injury specifically attributable to the nature of his duty,

the Treasury may grant to him, or, if he dies from the injury, to his widow, his mother (if wholly dependent on him at the time of his death), and to his children, or to any of them, such gratuity or annual allowance as the Treasury may consider reasonable, and as may be permitted by the terms of a warrant under this section.

- (2) The Treasury shall forthwith, after the passing of this Act, frame a warrant regulating the grant of gratuities and annual allowances under this section, and the warrant so framed shall be laid before Parliament;
- (3) Provided that a gratuity under this section shall not exceed one year's salary of the person injured, and an allowance under this section shall not, together with any superannuation allowance to which he is otherwise entitled, exceed the salary of the person injured, or three hundred pounds a year, whichever is less.

(a) 50 & 51 Vict. c. 67. See now the Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58), s. 6.

Chap. VI. By sec. 2 there is power to grant a retiring allowance to persons removed from office on the ground of "inability to discharge efficiently the duties of the office."

By sec. 4 of the same Act :

If a person employed in any public department in a capacity in respect of which a superannuation allowance cannot be granted under the Superannuation Act, 1859, retires or is removed from his employment, and

- (a) The employment is one to which he was required to devote his whole time ; and
- (b) The remuneration for the employment was paid entirely out of the moneys provided by Parliament ; and
- (c) He has served in the employment for not less than seven years, if he is removed in consequence of the abolition of his employment or for the purpose of facilitating improvements in the organization of the department, by which economy can be effected, or for not less than fifteen years if his retirement is caused from infirmity of mind or body, permanently incapacitating him from the duties of his employment ;

the Treasury may, if they think fit, grant to him a compassionate gratuity not exceeding one pound or one week's pay, whichever is the greater, for each year of his service in his employment.

Contractor and Employer. (a)

Contractor and employer.

We have incidentally seen that to entitle an injured person to recover under the Employers Liability Act, 1880,

(a) *Ante*, 267.

the relation between him and the person he is suing must be that of a workman and employer, not that of contractor and employer. (a) The test by which to determine whether the work is done under a contract or whether the employer merely hires labour, is to ascertain who has the power of controlling the work. The whole circumstances of the employment must be looked to, and the real effect must not be lost sight of by fixing attention on some special term, such as a provision for supervision or dismissal or payment in some particular way, which does not go to the root of the relation. Thus, where it was attempted to treat a common labourer employed for five shillings to clear out a ditch as a contractor, Lord Campbell pointed out (b) that "the defendant might have said, 'Fill up the hole in the road, but not as you are now doing it, lest when a horse goes over the place he may be injured,' the labourer would have been bound to comply, and so could not be an independent contractor, but a servant or workman merely." (c) The law as to this was summarized in *Martin v. Temperley*, (d) by Coleridge, J. : "It is said that a difference arises where the workman is paid so much for doing the whole job. But the defendant might pay either for a given time or a given work; and the men here were as much under the defendant's control as a gentleman's coachman is under that of his master."

The considerations to be given effect to are summed up in an American case (e) cited in "Bigelow's Leading Cases

Coleridge, J.
in *Martin v.*
Temperley.

Bigelow, Leading
Cases on the
Law of Torts.

(a) *Ante*, 11.

(b) *Sadler v. Henlock* (1885), 4 E. & B. 570; cp *Sly v. Edgeley*, 6 Esp. (N. P.) 6, which may be sustained on the ground that the bricklayer was not a contractor but only a servant. *Ante*, 139.

(c) See the law as stated by Bramwell, B., to the House of Commons Committee on Employers Liability, *ante*, 11.

(d) (1843), 4 Q. B. 298 at 312.

(e) *Cuff v. Newark and New York Ry. Co.*, 6 Vroom (N. J.) 17.

Chap VI. of Torts," (a) pointing out that "the question of liability depended upon the relation of master and servant, incident to which was the power to select the servant, direct him in the performance of his work, and to discharge him when found incompetent, and also the duty so to control his acts that no injury might be done to third persons."

Sub-contractor. But besides the existence of the relation of employer and workman being requisite to found a liability under the Employers Liability Act, 1880, it is further necessary that the relationship should be direct and not mediate. The interposition of a sub-contractor between the head employer and the workman will oust the application of the Act. Willes, J., says in *Murray v Currie* (b): "I apprehend it to be a clear rule in ascertaining who is liable for the act of a wrongdoer, that you must look to the wrongdoer himself, or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back, and make the employer of that person liable." The facts in the case showed that one Kennedy, a stevedore, was engaged by a shipowner to unboard his vessel. "The work of unboarding was done by Kennedy under a special contract. He was acting on his own behalf, and did not in any sense stand in the relation of servant to the defendant. He had entire control over the work, and employed such persons as he thought proper to act under him. He had the option of using the services of the crew of the ship, but he was under no obligation to do so. Whether he selected independent labourers or part of the crew, they were all his servants, and their acts were his acts, and not the acts of the owner." (c)

(a) At 651.

(b) L. R. 6 C. P. 24 at 27.

(c) Per Bovill, C.J., *l.c.* at 26; *cp* *Jones v. Corporation of Liverpool*, 14 Q. B. D. 890, *Union Steamship Co., Ltd. v. Claidge*, [1894] A. C. 185. The New York case of *Slater v. McCreau*, 64 N. Y. 108, is curious and to

Rolfe, B.'s statement in *Reedie v. L. & N.-W. Ry.* Chap. VI. Co.,^(a) of the principle of the immunity of a contractor for the wrongful act of the servant of a sub-contractor is that most usually quoted: "The liability of any one, other than the party actually guilty of any wrongful act, proceeds on the maxim, *qui facit per alium facit per se*." The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskillful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill or want of care of the person employed; but neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned."

"The test, I think," says Lord Gifford in a Scotch case,^(b) "always is—had the superior personal control or power over the acting or mode of acting of the subordinate? I use the expression 'personal control' because I think that this is always the turning-point in such cases. Was there a control or direction of the person in opposition to a mere right to object to the quality or description of the work done?"

The employer is not liable merely because in his contract he reserves the right of dismissing the sub-contractor or his workmen.^(c) The question in each case is whether the intermediate person is an independent contractor, so that the persons working under him are removed from the

the point. An undertaker was sued for damage done to plaintiff by a carriage in a funeral procession he was conducting, which was owned by the driver of it. The driver was held to be a sub-contractor.

(a) 4 Ex. 214 at 255. But see the exceptions to this: *Penny v. Wimbledon Urban Council*, [1899] 2 Q. B. 72, *Holliday v. National Telephone Co.*, [1899] 2 Q. B. 399; *The Shark*, [1900] P. 105. *Ante*, 61.

(b) *Stephon v. Thurso Police Commissioners* 3 R. 585 at 542.

(c) *Reedie v. L. & N.-W. Ry. Co.*, 4 Ex. 244.

Rolfe, B., in
Reedie v.
L. & N.-W. Ry.
Co.

Summary of the
law from
Stephon v.
Thurso Police
Commissioners.

Chap. VI. control of the head contractor, or whether the head contractor has directly or indirectly a practical control over the men employed. (a)

Where no
relation of
master and
servant no
liability

If the superior is not responsible for the appointment of the workmen, but is compelled to take them for the work, he is not liable under the Act; for the relation of master and servant does not exist between him and them. (b)

On the other hand, if the superior has any power of selection, though only from a limited number, he would be within the Act (c)

If there is any evidence of the head employer exercising practical control, the determination of whether he does exercise the control or not, where there is a jury, must be submitted to their determination. (d)

The tendency is very strong to hold that where piece-workers select their men, who then work in a scheme of work, the men so working are in the employment of the head contractor and not the sub-contractor (e)

Contract of Service (f)

Contract personally to
execute any
work.

“What the exact meaning of the distinction between ‘contract of service’ and ‘contract personally to execute any work or labour’ may be is not quite easy to see. The words may refer to a ‘contract’ to serve, say, for a month, as distinguished from a ‘contract’ to execute any work or

(a) *Levering v. St. Katharine's Dock Co*, 3 T. L. R. 607.

(b) *Lane v. Cotton*, 1 Lord Raym 616, *Whitfield v. Lord Le Despencer*, 2 Cowp 754, *Nicholson v. Monney*, 15 East, 381, *Foreman v. Mayor of Canterbury*, L. R. 6 Q. B. 211, per Blackburn, J., at 218.

(c) *Martin v. Temperley*, 4 Q. B. 298.

(d) *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. 193.

(e) *Levering v. St. Katharine's Dock Co*, 3 T. L. R. 607; *Brown v. Bitterley Coal Co.*, 2 T. L. R. 169.

(f) *Ante*, 267.

labour, say, to dig a drain. That may or may not be Chap. VI.
the distinction." (a)

"I should say that a contract of service is when a man is employed, say, as farm labourer, for three months or one year, and that the other words, 'contract personally to execute any work or labour,' apply to cases where a man is employed to do any specific work or labour" (b)

Where the workman's injury results in death "the legal personal representatives of the workman and any persons entitled in case of death shall have the same right of compensation and remedies against the employer as if the workman had not been a workman or not in the service of the employer nor engaged in his work." (c)

The words "personal representatives," or "legal representatives," or "legal personal representatives," are synonymous terms, and are *primè facie* equivalent to the words "executors and administrators" of the person deceased, (d) though if they are used to denote people who are to take beneficially under a settlement or will they will preferably mean next-of-kin. (e)

In the Statute of Distributions (f) the words "legal representatives" are used to mean children. Personal
representative.
Under Statute
of Distributions.

Here there is a distinction drawn between "legal personal representatives," i.e. executors and administrators, "and any persons entitled in case of death."

(a) Per Lindley, J., *Granger v. Aynsley*, 6 Q. B. D. 182 at 188.

(b) Per Lopes, J., *loc. cit.* at 189. See *Lobb v. Ains*, 7 N. S. W. R. (Law) 98. Cp. *Fitzpatrick v. Evans & Co.*, [1902] 1 K. B. 505.

(c) S. 1. *Ante*, 125

(d) *Stockdale v. Nicholson*, L. R. 4 Eq. 359. Cp. *In re Ware, Cumberlege v. Cumberlege-Ware*, 45 Ch. D. 269

(e) *Briggs v. Upton*, L. R. 7 Ch. 376.

(f) 22 & 23 Car. II. c. 10, ss. 6, 7.

Chap. VI.Under Lord
Campbell's Act

If the workman had been killed while entitled to the rights of one "not a workman of nor in the service of the employer nor engaged in his work," (a) the right of action would in the first instance vest in "the executor or administrator of the person deceased" under sec 2 of Lord Campbell's Act. (b) Thus it is plain the same meaning is placed on the words here

If there be no executor or administrator, or if there be such executor or administrator, and no action is brought within six months from the death out of which the cause of action arises, then an action may be brought by the wife, husband, parent or child of the person whose death fixes the cause of action. (c)

Parent and
child

"Parent," under Lord Campbell's Act, (d) includes father and mother, and grandfather and grandmother, and stepfather and stepmother, and "child" includes son and daughter, and grandson and granddaughter, and stepson and stepdaughter.

Where no
personal
representative

If there is no executor or administrator, as there need not be where there is no estate, the action which enures by reason of the death may be brought by surviving ascendants or descendants to the second degree. Apart from this provision, it would be necessary to take out administration of the deceased's estate before suing.

Compensation.

The rights of compensation (e) are stated by Bramwell, L.J., (f) as follows: "You must give the plaintiff a compensation for his pecuniary loss, you must give him compensation for his pain and bodily suffering; of course it

(a) *Ante*, 125.(b) 9 & 10 Vict. c. 93. *Ante*, 108.

(c) 27 & 28 Vict. c. 95, s. 1.

(d) 9 & 10 Vict. c. 93, s. 5. *Ante*, 106.(e) *Ante*, 125.(f) *Phillips v. L. & S.-W. Ry. Co.*, 5 C. P. D. 280 at 287. See also the summing-up of Field, J., 5 Q. B. D. 78.

is almost impossible for you to give to an injured man what can be strictly called a compensation; but you must take a reasonable view of the case, and must consider under all the circumstances what is a fair amount to be awarded to him. I have never known a direction in that form to be questioned. I may take the common case of a labourer receiving an injury, which has kept him out of work for perhaps six months, his evidence may be that before the time of the accident he was earning 25s. a week, that during twenty-six weeks he had been wholly incapacitated for work, that for ten weeks afterwards he has been able to earn only 10s. a week, and that he will not get into full work again for twenty weeks. The plaintiff will be entitled to 25s. for each of the twenty-six weeks, and to 15s. for each of the ten and twenty weeks. He is also entitled to some amount for his bodily sufferings and for his medical expenses; and in this manner the compensation to be awarded to him is estimated. I have put a case where a definite term may be fixed upon within which the party injured will recover. But suppose a case in which no definite term can be fixed; in that case the direction to the jury is that they must consider for themselves how long the plaintiff will be incapacitated from earning his livelihood or practising his profession, and that they must take into account the chance of his losing employment, if he had not met with the accident. Nevertheless the fundamental rule is to give the plaintiff a fair and reasonable compensation for his pecuniary loss."

The rule as to granting a new trial on the ground of the damages awarded being either inadequate or excessive is thus formulated by Lord Esher, M.R.: (a) "If the Court,

New trial on the ground of inadequate or excessive damages.

(a) *Præd v. Graham*, 21 Q. B. D. at 55. *Johnston v. G. W. Ry. Co.*, [1904] 2 K. B. 250, holds that the rule in *Præd v. Graham* must be

Chap VI. having fully considered the whole of the circumstances of the case, come to this conclusion only, we think that the damages are larger than we ourselves should have given, but not so large as that twelve sensible men could not reasonably have given them: then they ought not to interfere with the verdict. If, on the other hand, the Court thinks that, having regard to all the circumstances of the case, the damages are so excessive that no twelve men could reasonably have given them, then they ought to interfere with the verdict."

Character in
which person
may be on
premises of
another.

Again and again in our progress we have expressed the position of the workman as being identical with that of a licensee. It may be well to specify more exactly what that position is.

A person on the premises of another may, apart from the Employers Liability Act, 1880, be there—

On business.

(1) On business: when he is entitled to expect that, provided he uses reasonable care for his own safety, the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know of. (1)

As a guest.

(2) As a guest: when he must take the premises as he

construed in the light of such decisions as *Phillips v. E. & S. W. Ry. Co.*, holding that perversity in the jury in awarding damages need not be shown, but only that the jury have taken into consideration matters which ought not to be considered or have applied a wrong measure of damages.

(a) *Indermaur v. Dames*, L. R. 1 C. P. 271, in the Ex. Ch., L. R. 2 C. P. 311. In *Butts v. Goddard*, 4 T. L. R. 193, plaintiff recovered when, calling upon auctioneers and estate agents, she entered by a door which was not the usual entrance, and having reached a folding door, which she pushed open, fell down a flight of steps leading to a cellar. In *Mason v. Langford*, 4 T. L. R. 407, plaintiff was found by a jury not entitled to recover where, going after business hours to defendant's shop, which was closed though the door was ajar, she pushed the door open, and entering fell down a steep flight of stairs, the cover to which, a trap door, was raised.

finds them, provided only that there is no concealed danger known to the occupier against which he is not warned (*a*) Chap. VI.

(3) As a mere licensee; (*b*) when the licensor is not responsible for damage resulting from the dangers arising from the existing condition of the premises, unless he knew of them at the time of giving the licence and omitted to caution the licensee. "There must be something like fraud on the part of the giver before he can be made answerable." (*c*) As a mere licensee

(4) As a servant, when the master is not liable for the dangerous condition of premises till the servant has both shown the knowledge of the master and his own want of knowledge of the conditions which have caused the accident. (*d*) As servant.

The effect of the Act seems to be to raise the workman from the fourth of the classes just enumerated, and to place him in the position of those in the first. He is to be regarded as one invited upon premises for the common purpose of himself and the occupier (*e*).

The meaning of these words is thus explained by Bowen, L.J., in *Thomas v. Quartermaine* (*f*) "Does this language do more than remove such fetters on a workman's right to sue as had previously been held to arise out of the relation of master and workman? The express words of Bowen, L. J., in *Thomas v. Quartermaine*.

(*a*) *Southcott v. Stanley*, 1 H. & N. 217, *q.v.* *Chapman v. Rothwell*, 12 B. & P. 168, and *Collier v. Selton*, L. R. 3 C. P. 495.

(*b*) In *Holmes v. N.E. Ry. Co.*, L. R. 1 Ex. 251 at 258, *Chamell, B.*, says: "In one sense the plaintiff was a licensee, but he was not a mere licensee, and the word *mere* has a very qualifying operation."

(*c*) *Gautret v. Tipton*, L. R. 2 C. P. 371, *per Wille, J.*, at 375. See also *Keeble v. East and West India Docks*, 5 T. R. 112.

(*d*) *Griffiths v. London and St. Katharine Docks Co.*, 13 Q. B. D. 259. See *Webster v. Ballant*, 17 Q. B. D. 122, *per A. L. Smith, J.*, at 124.

(*e*) "The statute was intended to place the workman in the same position as a stranger lawfully on the property by the invitation of the occupier, but in no higher or better position." *per Fry, L.J.*, *Thomas v. Quartermaine*, 18 Q. B. D. 685 at 703.

(*f*) 18 Q. B. D. 685 at 692.

Chap. VI. the section seem to permit of only one answer to this inquiry. An enactment which distinctly declares that the workman is to have the same rights as if he were not a workman, cannot, except by violent distension of its terms, be strained into an enactment that the workman is to have the same rights as if he were not a workman and other rights in addition. It cannot in the case of a defect in the employer's works be distorted into the meaning that a new standard of duty is to be imposed on the employer as regards a workman, which would not exist as regards anybody else. If the language of the section were not even so precise, the point would be concluded, one might well think, by the observation that if the Act had intended to prescribe some new measure of duty the least one might expect would be that it should define it. What sort of duty could that be which does not exist at law, and which is not defined by Statute? It would be a duty that had no limits except the benevolence of a jury exercised at the expense of the pockets of other people." (a)

Workmen may
contract them-
selves out of
the Act

Under the Employers Liability Act, 1880, an express contract by which the workman engages to forego the benefits of the Act in the event of injury is valid; (b) since

(a) See *Webster v. Ballard*, 17 Q. B. D. 122, per A. L. Smith, J., at 124.

(b) *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357. The provisions of the Truck Act, 1831 (1 & 2 Will. IV. c. 37), are not applicable to the agreement in *Griffiths v. Earl of Dudley*. In *Owner v. Hooper*, 19 T. L. R. 602, a master in paying his workmen handed each a slip of paper on which was written a sum of money equal to 2d. in the pound on the amount of wages, which sum the workmen handed to the master, and which was applied to provide for insurance premiums paid by the master to cover his own liability under the Workmen's Compensation Act, 1897. This was held not to be a payment of wages within s. 8 of the Truck Act, 1831. Assuming they are, see *Hewlett v. Allen*, [1892] 2 Q. B. 662, affirmed in H. L., [1894] A. C. 348, also *Chawner v. Cummings*, 8 Q. B. 311, *Aicher v. James*, 2 B. & S. 61, where the £s. 61 were equally divided.

The rule of law as to contracting out of a liability imposed by statute has been the subject of so much discussion that it may be well to summarize the authorities. The maxim of law is *Quis renunciare potest juri pro se introducto*. *Bovall v. Wood*, 2 M. & S., per Bayley, J., 25; or as it appears

sec. 1 of the Act only negatives the implication of an Chap. VI.
agreement by the workman to bear the risks of the

in Cod. 2, 3, 29 *Amis licentiam habere, his, qui pro se introducta sunt, examinatione*. Cp. *Wilson v. McIntosh*, [1894] A.C. 131, 138 Comm. 67, C.B. Ry. Co. v. Gossard, 9 App. Cas., per Lord Selborne, 1, 935, where the form is, *Quasque per se introducta pro pro se introducta*, and *Bush v. Wylie*, 10 H.L. 1, per Lord Westbury, 1, 15, where the form is, *Quasque compulsi tenent, et pro pro se introducta*.

In *Rawbotham v. Wilson*, 8 B. & B. 151, Martin, B., says: "I cannot perceive any reason, either at law or otherwise, why parties should not be at liberty, by apt words, either to add to, or qualify, or make more or less extensive, the right which the law of itself provides and implies; or, if they think fit, declare that such rights shall not exist at all. *But this point is not now in question*." Again, in *Rumsey v. N. E. Ry. Co.*, 14 C.B. (N.S.), 114, C.J. 649 says: "It is undoubtedly competent to any man to renounce a privilege which is given to him by a statute." Lord Westbury, 1, draws attention to the word *pro se* in the maxim, which he says have been introduced to show that "no man can renounce a right which his duty to the public, which the claims of society, forbid the renunciation of." *Quint v. Hunt*, 31 L.J. (Ch. 173. See also *Markham v. Standard*, 11 C.B. (N.S.), per Byles, J., 481. *Monten v. Marshall*, 2 H. & C. 305. The maxim as to this, *Pactis privatis non publicis privilegium acquirit* *Swan v. Blinn*, 11 C. & P. 121, or, as it elsewhere appears, *non derogatum*.

In *Printing and Numerical Registering Co. v. Sampson*, 1 R. 19 159, 465, Jessel, M.R., says: "It must not be forgotten that you are not to extend unduly those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice." This passage is cited and approved by Fry, L.J., in *Rossillon v. Rossillon*, 14 L.J. 465, and by Chitty, J., in *Tullis v. Jackson*, 1492, 3 L.J. 145. (Holmes, *The Common Law*, 205. See also *Wallis v. Smith* 21 L.J. 11, per Jessel, M.R., 366. As to the argument of "public policy," Burroughs, J., says in *Richardson v. Mellish*, 2 Bing. 252: "1, for one, protest, as my Lord has done, against arguing too strongly upon public policy: it is a very unwholesome, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail." Even more forcible are the words of Mr. Perpoint in *quando*, the passage is too long to extract, in *The King v. Hunsden*, 3 How. St. Tr. 1233, see also Lord Mansfield, C.J., in *Wilkes's case*, 19 How. St. Tr. 1112.

"Public policy," as a ground of legal decision, is exhaustively treated in the leading case of *Pigott v. Earl Brownlow*, 11 C.L. 1. Pollock, C.B., in advising the Lords, summarises the cases as establishing the distinction, "that where a contract is directly opposed to public welfare it is void, though the parties may have a real interest in the matter, and an apparent right to deal with it." See also per Bowen, L.J., in *Maxim Nordenfolt*, etc., *Co. v. Nordenfolt*, [1893] 1 Ch. 665, affirmed in H.L., [1894] A.C. 595; and per Lord Halsbury, C., in *Janson v. Driefouten Consolidated Mines*, [1902] A.C. 491, citing *Marshall, Marine Insurance. In re Fitzgerald*, [1904] 1 Ch. 578.

Invito beneficium non datur D. 50, 17, 69; and *Pacta qua contra leges constitutionesque vel contra bonos mores sunt nullam vim habere, indubitate juris est*, Cod. 2, 3, 6, are the maxims of the Roman law.

Chap. VI. employment, but does not forbid the constitution of an express agreement.

Expiration of the Act.

The Employers Liability Act, 1880, which would have expired at the end of the session in 1888, was continued by 51 & 52 Vict c 58, until December 31, 1889, and has since been continued annually by the Expiring Laws Continuance Act

PART III

WORKMEN'S COMPENSATION
ACT, 1906

WORKMEN'S COMPENSATION ACT, 1906.

(6 EDW VII. c. 58.)

An Act to consolidate and amend the Law with respect to Compensation to Workmen for Injuries suffered in the course of their Employment. [21st December 1906.]

A.D. 1906

Enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1—(1) If in any employment (*a*) personal injury (*b*) by accident (*c*) arising out of and in the course of the employment (*d*) is caused to a workman, (*e*) his employer (*f*) shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act. (*g*)

Liability of employers to workmen for injuries.

* (2) Provided that—

(*a*) The employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least one week from earning full wages at the work at which he was employed: (*h*)

(*b*) When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer

(*a*) *Post*, 369. (*b*) *Ante*, 49 *et seqq.* (*c*) *Post*, 346.
(*d*) See per Buckley, L.J., *Fitzgerald v. W. G. Clarke & Son*, [1908] K. B. 796 at 799. *Post*, 369.
(*e*) *Post*, 441. (*f*) *Post*, 477. (*g*) *Post*, 325. (*h*) *Post*, 391.

A.D. 1906.

is responsible, (a) nothing in this Act shall affect any civil liability of the employer, (b) but in that case the workman may, at his option, (c) either claim compensation under this Act or take proceedings independently of this Act; (d) but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, (e) and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid: (f)

(e) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct (g) of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, (h) be disallowed.

(3) If any question arises in any proceedings under this Act as to the liability to pay compensation (i) under this Act (including any question as to whether the person injured is a workman to whom this Act applies), (k) or as to the amount or duration of compensation under this Act, (l) the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, (m) be settled by arbitration, in accordance with the Second Schedule to this Act. (n)

(4) If, within the time herein-after in this Act limited for taking proceedings, (o) an action is brought to recover

(a) *Ante*, 5, 20. (b) *Ante*, 4. (c) *Post*, 416. (d) *Post*, 426.
 (e) *Post*, 412. (f) *Ante*, 5, 20. (g) *Ante*, 894. (h) *Post*, 845, 894.
 (i) *Post*, 596, 600. (k) *Post*, 448. (l) *Post*, 515. (m) *Post*, 825.
 (n) *Post*, 335, 595. (o) *Post*, 596.

damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the court in which the action is tried shall, if the plaintiff so choose, proceed to assess such compensation, but may deduct from such compensation all or part of the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act. (a) In any proceeding under this subsection, when the court assesses the compensation it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this Act. (b)

A.D. 1906.

(5) Nothing in this Act shall affect any proceeding for a fine under the enactments relating to mines, factories, or workshops, or the application of any such fine. (c)

2.—(1) Proceedings (d) for the recovery under this Act of compensation (e) for an injury shall not be maintainable unless notice of the accident (f) has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation (g) with respect to such accident has been made within six months (h) from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death:

Time for taking proceedings.

Provided always that—

(a) the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of

(a) *Post*, 416. (b) *Post*, 653. (c) *Post*, 427. (d) *Post*, 596.
(e) *Post*, 658. (f) *Post*, 600. (g) *Post*, 599, 607. (h) *Post*, 612.

A.D. 1906.

such proceedings if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake, absence from the United Kingdom, or other reasonable cause; and

- (b) the failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause. (a)

(2) Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which the accident happened, and shall be served on the employer, or, if there is more than one employer, upon one of such employers. (b)

(3) The notice may be served by delivering the same at, or sending it by post in a registered letter addressed to, the residence or place of business of the person on whom it is to be served. (c)

(4) Where the employer is a body of persons, corporate or unincorporate, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to, the employer at the office, or, if there be more than one office, any one of the offices of such body. (d)

(a) *Post*, 606. (b) *Post*, 600. (c) *Ante*, 262. (d) *Post*, 601.

3.—(1) If the Registrar of Friendly Societies, after A.D. 1906.
taking steps to ascertain the views of the employer and Contracting out.
workmen, certifies that any scheme of compensation,
benefit, or insurance for the workmen of an employer in
any employment, whether or not such scheme includes
other employers and their workmen, provides scales of
compensation not less favourable to the workmen and
their dependants than the corresponding scales contained
in this Act, (a) and that, where the scheme provides for
contributions by the workmen, the scheme confers benefits
at least equivalent to those contributions, in addition to
the benefits to which the workmen would have been
entitled under this Act, (b) and that a majority (to be
ascertained by ballot) of the workmen to whom the
scheme is applicable are in favour of such scheme, the
employer may, whilst the certificate is in force, contract
with any of his workmen that the provisions of the scheme
shall be substituted for the provisions of this Act, (c) and
thereupon the employer shall be liable only in accordance
with the scheme, but, save as aforesaid, this Act shall apply
notwithstanding any contract to the contrary made after
the commencement of this Act (d)

(2) The Registrar may give a certificate to expire at
the end of a limited period of not less than five years, and
may from time to time renew with or without modifications
such a certificate to expire at the end of the period for
which it is renewed. (e)

(3) No scheme shall be so certified which contains an
obligation upon the workman to join the scheme as a
condition of their hiring, or which does not contain

(a) *Post*, 428.

(b) *Post*, 430.

(c) *Post*, 427.

(d) *Post*, 428.

(e) *Post*, 432.

A.D. 1906

provisions enabling a workman to withdraw from the scheme. (a)

(4) If complaint is made to the Registrar of Friendly Societies by or on behalf of the workmen of any employer that the benefits conferred by any scheme no longer conform to the conditions stated in subsection (1) of this section, or that the provisions of such scheme are being violated, or that the scheme is not being fairly administered, or that satisfactory reasons exist for revoking the certificate, the Registrar shall examine into the complaint, and, if satisfied that good cause exist for such complaint, shall, unless the cause of complaint is removed, revoke the certificate. (b)

(5) When a certificate is revoked or expires, any moneys or securities held for the purpose of the scheme shall, after due provision has been made to discharge the liabilities already accrued, be distributed as may be arranged between the employer and workmen, or as may be determined by the Registrar of Friendly Societies in the event of a difference of opinion. (c)

(6) Whenever a scheme has been certified as aforesaid, it shall be the duty of the employer to answer all such inquiries and to furnish all such accounts in regard to the scheme as may be made or required by the Registrar of Friendly Societies. (d)

(7) The Chief Registrar of Friendly Societies shall include in his annual report the particulars of the proceedings of the Registrar under this Act.

(8) The Chief Registrar of Friendly Societies may

(a) *Post*, 430.(b) *Post*, 430.(c) *Post*, 431.(d) *Post*, 428.

make regulations for the purpose of carrying this section into effect. (a) A.D. 1906

4.—(1) Where any person (in this section referred to as the principal), in the course of or for the purposes of his trade or business, (b) contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, (c) the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him, and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this Act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed.

Provided that, where the contract relates to threshing, ploughing, or other agricultural work, and the contractor provides and uses machinery driven by mechanical power for the purpose of such work, he and he alone shall be liable under this Act to pay compensation to any workman employed by him on such work. (d)

(2) Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by any person who would have been liable to pay compensation to the workman independently of this section, and all questions as to the right to and amount of any such

(a) *Post*, 428. (b) *Post*, 459. (c) *Post*, 464. (d) *Post* 510

A D 1906

indemnity shall in default of agreement be settled by arbitration under this Act. (a)

(3) Nothing in this section shall be construed as preventing a workman recovering compensation under this Act from the contractor instead of the principal. (b)

(4) This section shall not apply in any case where the accident occurred elsewhere than on, or in, or about premises on which the principal has undertaken to execute the work or which are otherwise under his control or management. (c)

Provision as to
cases of bank-
ruptcy of
employer.

5—(1) Where any employer has entered into a contract with any insurers in respect of any liability under this Act to any workman, then, in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or if the employer is a company in the event of the company having commenced to be wound up, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in the enactments relating to bankruptcy and the winding up of companies, be transferred to and vest in the workman, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer. (d) so however that the insurers shall not be under any greater liability to the workman than they would have been under to the employer. (e)

(2) If the liability of the insurers to the workman is less than the liability of the employer to the workman, the workman may prove for the balance in the bankruptcy or liquidation. (f)

(a) *Post*, 312. (b) *Post*, 514. (c) *Post*, 495, 510. (d) *Post*, 681.

(e) *Post*, 562.

(f) *Post*, 564.

(3) There shall be included among the debts which under section one of the Preferential Payments in Bankruptcy Act, 1888, and section four of the Preferential Payments in Bankruptcy (Ireland) Act, 1889, are in the distribution of the property of a bankrupt and in the distribution of the assets of a company being wound up to be paid in priority to all other debts, the amount, not exceeding in any individual case one hundred pounds, due in respect of any compensation the liability wherefor accrued before the date of the receiving order or the date of the commencement of the winding up, and these Acts and the Preferential Payments in Bankruptcy Amendment Act, 1897, shall have effect accordingly. Where the compensation is a weekly payment, the amount due in respect thereof shall, for the purposes of this provision, be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under the First Schedule to this Act. ^(a)

(4) In the case of the winding up of a company within the meaning of the Companies Act, 1887, such an amount as aforesaid, if the compensation is payable to a miner or the dependants of a miner, shall have the like priority as is conferred on wages of miners by section nine of that Act, and that section shall have effect accordingly. ^(b)

(5) The provisions of this section with respect to preferences and priorities shall not apply where the bankrupt or the company being wound up has entered into such a contract with insurers as aforesaid. ^(c)

(6) This section shall not apply where a company is wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company. ^(d)

(a) *Post*, 584. (b) *Post*, 585. (c) *Post*, 585. (d) *Post*, 594.

AD 1906
Remedies both
against employer
and stranger

6 Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability^(a) in some person other than the employer to pay damages in respect thereof^(b)—

- (1) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation; ^(c) and
- (2) If the workman has recovered compensation under this Act, the person by whom the compensation was paid (and any person who has been called on to pay an indemnity under the section of this Act relating to sub-contracting) shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this Act. ^(d)

Application of
Act to seamen.

7—(1) This Act shall apply to masters, seamen, and apprentices to the sea service and apprentices in the sea-fishing service, ^(e) provided that such persons are workmen within the meaning of this Act, and are members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner, or (if there is more than one owner) the managing owner, or manager resides or has his principal place of business in the United Kingdom, ^(f) subject to the following modifications—

(a) Page 1 Burtwell, [1905] 2 K. B. 708 (b) Post, 373, 380
(c) Post, 658 (d) Post, 691. (e) Post, 450, 593 (f) Post, 451.

- (a) The notice of accident and the claim for compensation may, except where the person injured is the master, be served on the master of the ship as if he were the employer, but where the accident happened and the incapacity commenced on board the ship it shall not be necessary to give any notice of the accident : (a)
- (b) In the case of the death of the master, seaman, or apprentice, the claim for compensation shall be made within six months after news of the death has been received by the claimant : (b)
- (c) Where an injured master, seaman, or apprentice is discharged or left behind in a British possession or in a foreign country, depositions respecting the circumstances and nature of the injury may be taken by any judge or magistrate in the British possession, and by any British consular officer in the foreign country, and if so taken shall be transmitted by the person by whom they are taken to the Board of Trade, and such depositions or certified copies thereof shall in any proceedings for enforcing the claim be admissible in evidence as provided by sections six hundred and ninety-one and six hundred and ninety-five of the Merchant Shipping Act, 1894, ^{27 & 28 Vict. c. 60.} and those sections shall apply accordingly : (c)
- (d) In the case of the death of a master, seaman, or apprentice, leaving no dependants, no compensation shall be payable, if the owner of the ship is under the Merchant Shipping Act, 1894, liable to pay the expenses of the burial : (d)

A.D. 1906.

- (e) The weekly payment shall not be payable in respect of the period during which the owner of the ship is, under the Merchant Shipping Act, 1894, as amended by any subsequent enactment, or otherwise, liable to defray the expenses of maintenance of the injured master, seaman, or apprentice. *(a)*
- (f) Any sum payable by way of compensation by the owner of a ship under this Act shall be paid in full notwithstanding anything in section five hundred and three of the Merchant Shipping Act, 1894 (which relates to the limitation of a shipowner's liability in certain cases of loss of life, injury, or damage), but the limitation on the owner's liability imposed by that section shall apply to the amount recoverable by way of indemnity under the section of this Act relating to remedies both against employer and stranger as if the indemnity were damages for loss of life or personal injury. *(b)*
- (g) Subsections (2) and (3) of section one hundred and seventy-four of the Merchant Shipping Act, 1894 (which relates to the recovery of wages of seamen lost with their ship), shall apply in respects proceedings for the recovery of compensation by dependants of masters, seamen, and apprentices lost with their ship as they apply with respect to proceedings for the recovery of wages due to seamen and apprentices; and proceedings for the recovery of compensation shall in such a case be maintainable if the claim is made within eighteen

*(a) Post, 593.**(b) Post, 593.*

months of the date at which the ship is deemed to have been lost with all hands. (a)

A. D. 1906

(2) This Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel. (b)

(3) This section shall extend to pilots to whom Part X. of the Merchant Shipping Act, 1894, applies, as if a pilot when employed on any such ship as aforesaid were a seaman and a member of the crew. (c)

8 —(1) Where—

(i) the certifying surgeon appointed under the Factory and Workshop Act, 1901, (d) for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the Third Schedule (e) to this Act, and is thereby disabled (f) from earning full wages at the work at which he was employed; or

Application of
Act to industrial
diseases
1 Edw VII c 22.

(ii) a workman is, in pursuance of any special rules or regulations made under the Factory and Workshop Act, 1901, suspended from his usual employment on account of having contracted any such disease (g), or

(iii) the death of a workman is caused by any such disease, (h)

and the disease is due to the nature of any employment (i) in which the workman was employed at any time within the twelve months (k) previous to the date of the disablement or suspension, (l) whether under one or more employers, he

(a) *Post*, 618.

(d) 1 Edw VII. c 22, ss. 122-124.

(g) *Post*, 366.

(k) *Post*, 368.

(b) *Ibid*, 452.

(e) *Post*, 342.

(h) *Post*, 357.

(l) *Post*, 364.

(c) *Post*, 458.

(f) *Post*, 364.

(i) *Post*, 366.

A.D. 1906

or his dependants shall be entitled to compensation under this Act (*a*) as if the disease or such suspension as aforesaid were a personal injury by accident (*b*) arising out of and in the course of that employment, subject to the following modifications :—

- (*a*) The disablement or suspension shall be treated as the happening of the accident ; (*c*)
- (*b*) If it is proved that the workman has at the time of entering the employment wilfully and falsely represented himself in writing (*d*) as not having previously suffered from the disease, compensation shall not be payable ;
- (*c*) The compensation shall be recoverable from the employer who last employed the workman during the last twelve months in the employment to the nature of which the disease was due (*e*)

Provided that—

(1) the workman or his dependants if so required shall furnish that employer with such information as to the names and addresses of all the other employers who employed him in the employment during the said twelve months as he or they may possess, (*f*) and, if such information is not furnished, or is not sufficient to enable that employer to take proceedings under the next following proviso, that employer upon proving that the disease was not contracted whilst the workman was in his employment shall not be liable to pay compensation ; (*g*) and

) *Ante*, 299. (*b*) *Post*, 346. (*c*) *Post*, 357. (*d*) *Post*, 357.
(*e*) *Post*, 363. (*f*) *Post*, 358. (*g*) *Post*, 359.

(m) if that employer alleges that the disease was in fact contracted whilst the workman was in the employment of some other employer, (n) and not whilst in his employment, he may join such other employer as a party to the arbitration, (h) and if the allegation is proved that other employer shall be the employer from whom the compensation is to be recoverable, (i) and

(m) if the disease is of such a nature as to be contracted by a gradual process, (d) any other employers who during the said twelve months (e) employed the workman in the employment to the nature of which the disease was due (f) shall be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined in the arbitration under this Act for settling the amount of the compensation, (g)

(j) The amount of the compensation shall be calculated with reference to the earnings of the workman under the employer from whom the compensation is recoverable, (h)

(i) The employer to whom notice of the death, disablement, or suspension is to be given shall be the employer who last employed the workman during the said twelve months in the employment to the

(a) *Post*, 359. (b) *Post*, 359. (c) *Post*, 360. (d) *Post*, 360, 369.
(e) *Post*, 360. (f) *Post*, 361. (g) *Post*, 360, 363. (h) *Post*, 363.

A.D. 1906

nature of which the disease was due, (a) and the notice may be given notwithstanding that the workman has voluntarily left his employment (b)

(f) If an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement or in suspending or refusing to suspend a workman for the purposes of this section, the matter shall in accordance with regulations made by the Secretary of State be referred to a medical referee, whose decision shall be final (c)

(2) If the workman at or immediately before the date of the disablement or suspension was employed in any process mentioned in the second column of the Third Schedule to this Act, (d) and the disease contracted is the disease in the first column of that Schedule set opposite the description of the process, (e) the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary. (f)

(3) The Secretary of State may make rules regulating the duties and fees of certifying and other surgeons (including dentists) under this section. (g)

(4) For the purposes of this section the date of disablement (h) shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given: Provided that—

(a) *Post*, 363. (b) *Post*, 363. (c) *Post*, 364. (d) *Post*, 342.
(e) *Post*, 342. (f) *Post*, 364, 366, 368 (g) *Post*, 352. (h) *Post*, 366.

(c) Where the medical referee allows an appeal against a refusal by a certifying surgeon to give a certificate of disablement, the date of disablement shall be such date as the medical referee may determine. ^{1(c)}

(d) Where a workman dies without having obtained a certificate of disablement, or is at the time of death not in receipt of a weekly payment on account of disablement, it shall be the date of death. ^(d)

(5) In such cases, and subject to such conditions as the Secretary of State may direct, a medical practitioner appointed by the Secretary of State for the purpose shall have the powers and duties of a certifying surgeon under this section, and this section shall be construed accordingly. ⁽⁵⁾

(6) The Secretary of State may make orders for extending the provisions of this section to other diseases and other processes, and to injuries due to the nature of any employment specified in the order not being injuries by accident, either without modification or subject to such modifications as may be contained in the order. ⁽⁶⁾

(7) Where, after inquiry held on the application of any employers or workmen engaged in any industry to which this section applies, it appears that a mutual trade insurance company or society for insuring against the risks under this section has been established for the industry, and that a majority of the employers engaged in that industry are insured against such risks in the company or society and that the company or society consents, the Secretary of State may, by Provisional Order, require all

(a) *Post*, 366. (b) *Post*, 366. (c) *Post*, 352. (d) *Post* 350.

A.D. 1906

employers in that industry to insure in the company or society upon such terms and under such conditions and subject to such exceptions as may be set forth in the Order. Where such a company or society has been established, but is confined to employers in any particular locality or of any particular class, the Secretary of State may for the purposes of this provision treat the industry, as carried on by employers in that locality or of that class, as a separate industry. (a)

(8) A Provisional Order made under this section shall be of no force whatever unless and until it is confirmed by Parliament, and if, while the Bill confirming any such Order is pending in either House of Parliament, a petition is presented against the Order, the Bill may be referred to a Select Committee, and the petitioner shall be allowed to appear and oppose as in the case of Private Bills, and any Act confirming any Provisional Order under this section may be repealed, altered, or amended by a Provisional Order made and confirmed in like manner. (b)

(9) Any expenses incurred by the Secretary of State in respect of any such Order, Provisional Order, or confirming Bill shall be defrayed out of moneys provided by Parliament. (c)

(10) Nothing in this section shall affect the rights of a workman to recover compensation in respect of a disease to which this section does not apply, if the disease is a personal injury by accident within the meaning of this Act. (d)

Application to
workmen in
employment of
Crown.

9.—(1) This Act shall not apply to persons in the naval or military service of the Crown, but otherwise shall apply to workmen employed by or under the Crown to whom

(a) *Post*, 868. (b) *Post*, 868. (c) *Post*, 868. (d) *Post*, 868.

this Act would apply if the employer were a private person: (a) A D 1906

Provided that in the case of a person employed in the private service of the Crown, the head of that department of the Royal Household in which he was employed at the time of the accident shall be deemed to be his employer (b)

(2) The Treasury may, by warrant laid before Parliament, modify for the purposes of this Act their warrant made under section one of the Superannuation Act, 1887, and notwithstanding anything in that Act, or any such warrant, may frame schemes with a view to their being certified by the Registrar of Friendly Societies under this Act. (c) 70 & 51 Vict
c. 65

10.-(1) The Secretary of State may appoint such legally qualified medical practitioners to be medical referees for the purposes of this Act as he may, with the sanction of the Treasury, determine, and the remuneration of, and other expenses incurred by, medical referees under this Act shall, subject to regulations made by the Treasury, be paid out of moneys provided by Parliament. (d) Appointment
and remunera-
tion of medical
referees and
arbitrators.

Where a medical referee has been employed as a medical practitioner in connection with any case by or on behalf of an employer or workman or by any insurers interested, he shall not act as medical referee in that case. (e)

(2) The remuneration of an arbitrator appointed by a judge of county courts under the Second Schedule to this Act shall be paid out of moneys provided by Parliament in accordance with regulations made by the Treasury. (f)

(a) *Post*, 437, 479. (b) *Post*, 437. (c) *Post*, 437. (d) *Post*, 579.
(e) *Post*, 576. (f) *Post*, 631.

A D 1906
Detention of
ships.

11—(1) If it is alleged that the owners of any ship are liable as such owners to pay compensation under this Act, and at any time that ship is found in any port or river of England or Ireland, or within three miles of the coast thereof, a judge of any court of record in England or Ireland may, upon its being shown to him by any person applying in accordance with the rules of the court that the owners are probably liable as such to pay such compensation, and that none of the owners reside in the United Kingdom, issue an order directed to any officer of customs or other officer named by the judge requiring him to detain the ship until such time as the owners, agent, master, or consignee thereof have paid such compensation, or have given security, to be approved by the judge, to abide the event of any proceedings that may be instituted to recover such compensation and to pay such compensation and costs as may be awarded thereon, and any officer of customs or other officer to whom the order is directed shall detain the ship accordingly. (a)

(2) In any legal proceeding to recover such compensation, the person giving security shall be made defendant, and the production of the order of the judge, made in relation to the security, shall be conclusive evidence of the liability of the defendant to the proceeding. (b)

57 & 58 Vict
c. 60.

(3) Section six hundred and ninety-two of the Merchant Shipping Act, 1891, shall apply to the detention of a ship under this Act as it applies to the detention of a ship under that Act, and, if the owner of a ship is a corporation, it shall for the purposes of this section be deemed to reside in the United Kingdom if it has an office in the United Kingdom at which service of writs can be effected. (c)

(a) *Post*, 697. (b) *Post*, 698. (c) *Post*, 700.

12 —(1) Every employer in any industry to which the Secretary of State may direct that this section shall apply shall, on or before such day in every year as the Secretary of State may direct, send to the Secretary of State a correct return specifying the number of injuries in respect of which compensation has been paid by him under this Act during the previous year, and the amount of such compensation, together with such other particulars as to the compensation as the Secretary of State may direct, and in default of complying with this section shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding five pounds (a)

A.D. 1906
Returns as to
compensation

(2) Any regulations made by the Secretary of State containing such directions as aforesaid shall be laid before both Houses of Parliament as soon as may be after they are made

13 In this Act, unless the context otherwise requires,— **Definitions.**

“Employer” includes any body of persons corporate or unincorporate and the legal personal representative of a deceased employer, (b) and where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this Act, be deemed to continue to be the employer of the workman whilst he is working for that other person. (c)

“Workman” does not include any person employed otherwise than by way of manual labour (d) whose remuneration exceeds two hundred and fifty

(a) *Post*, 702. (b) *Post*, 477 (c) *Post*, 477. (d) *Post*, 454.

A.D. 1906

pounds a year, (a) or a person whose employment is of a casual nature (b) and who is employed otherwise than for the purposes of the employer's trade or business, (c) or a member of a police force, (d) or an out worker, (e) or a member of the employer's family dwelling in his house, (f) but, save as aforesaid, means any person who has entered into or works under a contract of service (g) or apprenticeship (h) with an employer, (i) whether by way of manual labour, (k) clerical work, (l) or otherwise, (m) and whether the contract is expressed or implied, or oral or in writing; (n)

Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative (o) or to his dependants (p) or other person to whom or for whose benefit compensation is payable; (q)

"Dependants" means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would but for the incapacity due to the accident have been so dependent, (r) and where the workman, being the parent or grand parent of an illegitimate child, leaves such a child so dependent upon his earnings, or, being an illegitimate child, leaves a parent or grandparent so dependent upon his earnings,

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|------------------------|----------------------------|----------------------------|------------------------|
| (a) <i>Post</i> , 451. | (b) <i>Post</i> , 455, 544 | (c) <i>Post</i> , 460, 545 | (d) <i>Post</i> , 461. |
| (e) <i>Post</i> , 461 | (f) <i>Post</i> , 462. | (g) <i>Post</i> , 441 | (h) <i>Post</i> , 448. |
| (i) <i>Post</i> , 442 | (k) <i>Post</i> , 454. | (l) <i>Post</i> , 454 | (m) <i>Post</i> , 442 |
| (n) <i>Post</i> , 442 | (o) <i>Post</i> , 462, 579 | (p) <i>Post</i> , 550, 551 | (q) <i>Post</i> , 552. |
| | (r) <i>Post</i> , 462. | | |

shall include such an illegitimate child and parent or grandparent respectively. (c) A 19 1906

"Member of a family" means wife or husband, father, mother, grandfather, grandmother, step-father, step-mother, son, daughter, grandson, grand-daughter, step-son, step-daughter, brother, sister, half-brother, half-sister; (b)

"Ship," (e) "vessel," (f) "seaman," (e) and "port" (f) have the same meanings as in the Merchant Shipping Act, 1891.

"Manager," in relation to a ship, means the ship's husband or other person to whom the management of the ship is entrusted by or on behalf of the owner; (g)

"Police force" means a police force to which the Police Act, 1890, or the Police (Scotland) Act, 1890, applies, the City of London Police Force, the Royal Irish Constabulary, and the Dublin Metropolitan Police Force; (h) 1906 Vict. 40
Edw. 6 54 1905
67

"Outworker" means a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, or repaired, or adapted for sale, in his own home or on other premises not under the control or management of the person who gave out the materials or articles. (i)

The exercise and performance of the powers and duties of a local or other public authority shall, for the purposes of this Act, be treated as the trade or business of the authority; (k)

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| (a) <i>Post</i> , 469 | (b) <i>Post</i> , 462. | (c) <i>Post</i> , 453 | (d) <i>Post</i> , 452 |
| (e) <i>Post</i> , 452 | (f) <i>Post</i> , 452 | (g) <i>Post</i> , 451 | (h) <i>Post</i> , 461 |
| | (i) <i>Post</i> , 461 | (k) <i>Post</i> , 459. | |

A.D. 1906

"County court," "judge of the county court," "registrar of the county court," "plaintiff," and "rules of court," (a) as respects Scotland, mean respectively sheriff court, sheriff, sheriff clerk, pursuer, and act of sederunt. (b)

Special provisions as to Scotland.

43 & 44 Vict. c. 52.

14. In Scotland, where a workman raises an action against his employer independently of this Act in respect of any injury caused by accident arising out of and in the course of the employment, the action, if raised in the sheriff court and concluding for damages under the Employers Liability Act, 1880, or alternatively at common law or under the Employers Liability Act, 1880, shall, notwithstanding anything contained in that Act, not be removed under that Act or otherwise to the Court of Session, nor shall it be appealed to that court otherwise than by appeal on a question of law; and for the purposes of such appeal the provisions of the Second Schedule to this Act in regard to an appeal from the decision of the sheriff on any question of law determined by him as arbitrator under this Act shall apply (c)

Provisions as to existing contracts and schemes
60 & 61 Vict. c. 37.

A.

15—(1) Any contract (other than a contract substituting the provisions of a scheme certified under the Workmen's Compensation Act, 1897, for the provisions of that Act) existing at the commencement of this Act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of this Act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this Act. (d)

(a) See 52 & 53 Vict. c. 63, s. 14 and 56 & 57 Vict. c. 66

(b) *Post*, 582.

(c) *Post*, 702.

(d) *Post*, 431.

(2) Every scheme under the Workmen's Compensation Act, 1897, in force at the commencement of this Act shall, if re-certified by the Registrar of Friendly Societies, have effect as if it were a scheme under this Act (a) A D 1906.

(3) The Registrar shall re-certify any such scheme if it is proposed to his satisfaction that the scheme conforms, or has been so modified as to conform, with the provisions of this Act as to schemes. (b)

(4) If any such scheme has not been so re-certified before the expiration of six months from the commencement of this Act the certificate thereof shall be revoked

16 --(1) This Act shall come into operation on the first day of July nineteen hundred and seven, but, except so far as it relates to references to medical referees, and proceedings consequent thereon, shall not apply in any case where the accident happened before the commencement of this Act. Commencement and repeal.

(2) The Workmen's Compensation Acts, 1897 and 1900, are hereby repealed, but shall continue to apply to cases where the accident happened before the commencement of this Act, except to the extent to which this Act applies to those cases. 60 & 61 Vict. c. 37.
63 & 64 Vict. c. 22.

17. This Act may be cited as the Workmen's Compensation Act, 1906. Short title.

(a) *Post*, 434, 703.

(b) *Post*, 434, 703.

SCHEDULES.

A.D. 1906

FIRST SCHEDULE

First Schedule

SCALE AND CONDITIONS OF COMPENSATION.

(1) The amount of compensation under this Act shall be—

(a) where death results from the injury—

(i) if the workman leaves any dependants wholly dependent upon his earnings, (a) a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger but not exceeding in any case three hundred pounds, (b) provided that the amount of any weekly payments made under this Act, and any lump sum paid in redemption thereof, shall be deducted from such sum, (c) and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be one hundred and fifty-six times his average weekly earnings during the period of his actual employment under the said employer; (d)

(ii) if the workman does not leave any such dependants, but leaves any dependants in

(a) *Test*, 392. (b) *Test*, 512. (c) *Test*, 511, 530. (d) *Test*, 520.

A. P. 1906
First Schedule

part dependent upon his earnings, ^(a) such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants: ^(b) and

(iii) if he leaves no dependants, the reasonable expenses of his medical attendance and burial, not exceeding ten pounds; ^(c)

^(b) where total or partial incapacity for work results from the injury, ^(d) a weekly payment during the incapacity not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, ^(e) but if not then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound: ^(f)

Provided that—

^(a) if the incapacity lasts less than two weeks no compensation shall be payable in respect of the first week: ^(g) and

^(b) as respects the weekly payments during total incapacity of a workman who is under twenty-one years of age at the date of the injury, and whose average weekly earnings are less than twenty shillings, one hundred per cent. shall be substituted for fifty per cent. of his average weekly

^(a) *Post*, 547. ^(c) *Post*, 531, 648. ^(e) *Post*, 550, 579. ^(d) *Post*, 552.

^(e) *Post*, 392. ^(f) *Post*, 627, 569. ^(g) *Post*, 553.

earnings, but the weekly payment shall in no case exceed ten shillings. (a)

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(2) For the purposes of the provision of this schedule relating to "earnings" (b) and "average weekly earnings" (c) of a workman, the following rules shall be observed:—

(a) average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated; (b) Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, (c) or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, (d) or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district, (e)

(b) where the workman had entered into concurrent contracts of service (b) with two or more employers under which he worked at one time for one such employer and at another time for another such employer, his average weekly earnings (c) shall be computed as if his earnings under all such contracts were earnings in the employment of the

(a) *Post*, 553. (b) *Post*, 519, 572. (c) *Post*, 519. (d) *Post*, 392, 519, 585.
(e) *Post*, 544. (f) *Post*, 588. (g) *Post*, 588. (h) *Post*, 543.

A D 1906
First Schedule.

employer for whom he was working at the time of the accident, (a)

(c) employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause, (b)

(d) where the employer has been accustomed to pay to the workman a sum to cover any special expenses incurred on him by the nature of his employment, the sum so paid shall not be reckoned as part of the earnings, (e)

(3) In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, (f) and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper, (g)

(4) Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, (i) and, if he refuses to submit himself to such examination, or in any way obstructs the same, (j) his right to compensation, and to take or

(a) *Post*, 521. (b) *Post*, 537, 538. (c) *Post*, 533. (d) *Post*, 553.
(e) *Post*, 560. (f) *Post*, 676. (g) *Post*, 676.

prosecute any proceeding under this Act in relation to compensation, shall be suspended until such examination has taken place. (c)

¹ D. 1906

First Schedule.

(5) The payment in the case of death shall, unless otherwise ordered as hereinafter provided, be paid into the county court, and any sum so paid into court shall, subject to rules of court and the provisions of this schedule, be invested, applied, or otherwise dealt with by the court in such manner as the court in its discretion thinks fit for the benefit of the persons entitled thereto under this Act, and the receipt of the registrar of the court shall be a sufficient discharge in respect of the amount paid in. (b)

Provided that, if so agreed, the payment in case of death shall, if the workman leaves no dependants, be made to his legal personal representative, or, if he has no such representative, to the person to whom the expenses of medical attendance and burial are due. (c)

(6) Rules of court may provide for the transfer of money paid into court under this Act from one court to another, whether or not the court from which it is to be transferred is in the same part of the United Kingdom as the court to which it is to be transferred.

(7) Where a weekly payment is payable under this Act to a person under any legal disability, a county court may, on application being made in accordance with rules of court, order that the weekly payment be paid during the disability into court, and the provisions of this schedule with respect to sums required by this schedule to be paid into court shall apply to sums paid into court in pursuance of any such order. (d)

(a) *Post*, 676.

(b) *Post*, 549.

(c) *Post*, 552.

(d) *Post*, 592.

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A.D. 1906
First Schedule.

(8) Any question as to who is a dependant shall, in default of agreement, be settled by arbitration under this Act, or, if not so settled before payment into court under this schedule, shall be settled by the county court, and the amount payable to each dependant shall be settled by arbitration under this Act, or, if not so settled before payment into court under this schedule, by the county court. Where there are both total and partial dependants nothing in this schedule shall be construed as preventing the compensation being allotted partly to the total and partly to the partial dependants. (a)

(9) Where, on application being made in accordance with rules of court, it appears to a county court that, on account of neglect of children on the part of widow, or on account of the variation of the circumstances of the various dependants, or for any other sufficient cause, an order of the court or an award as to the apportionment amongst the several dependants of any sum paid as compensation, or as to the manner in which any sum payable to any such dependant is to be invested, applied, or otherwise dealt with, ought to be varied, the court may make such order for the variation of the former order or the award, as in the circumstances of the case the court may think just. (b)

(10) Any sum which under this schedule is ordered to be invested may be invested in whole or in part in the Post Office Savings Bank by the registrar of the county court in his name as registrar. (c)

(11) Any sum to be so invested may be invested in the purchase of an annuity from the National Debt Commissioners through the Post Office Savings Bank, or be accepted by the Postmaster-General as a deposit in the name of the registrar as such, and the provisions of any

(a) *Post*, 549.

(b) *Post*, 593.

(c) *Post*, 581.

statute or regulations respecting the limits of deposits in savings banks, and the declaration to be made by a depositor, shall not apply to such sums. (a)

AD 1906.
First Schedule.

(12) No part of any money invested in the name of the registrar of any county court in the Post Office Savings Bank under this Act shall be paid out, except upon authority addressed to the Postmaster-General by the Treasury or, subject to regulations of the Treasury, by the judge or registrar of the county court.

(13) Any person deriving any benefit from any moneys invested in a post office savings bank under the provisions of this Act may, nevertheless, open an account in a post office savings bank or in any other savings bank in his own name without being liable to any penalties imposed by any statute or regulations in respect of the opening of accounts in two savings banks, or of two accounts in the same savings bank.

(14) Any workman receiving weekly payments under this Act shall, if so required by the employer, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid for by the employer. If the workman refuses to submit himself to such examination, or in any way obstructs the same, (b) his right to such weekly payments shall be suspended until such examination has taken place. (c)

(15) A workman shall not be required to submit himself for examination by a medical practitioner under paragraph (1) or paragraph (14) of this schedule otherwise than in accordance with regulations made by the Secretary of State, or at more frequent intervals than may be prescribed by those regulations. (d)

(a) *Post*, 681.

(b) *Post*, 680, 694.

(c) *Post*, 676.

(d) *Post*, 680.

A D 1906
First Schedule

Where a workman has so submitted himself for examination by a medical practitioner or has been examined by a medical practitioner selected by himself, and the employer or the workman, as the case may be, has within six days after such examination furnished the other with a copy of the report of that practitioner as to the workman's condition, then, in the event of no agreement being come to between the employer and the workman as to the workman's condition or fitness for employment, the registrar of a county court, on application being made to the court by both parties, may, on payment by the applicants of such fee not exceeding one pound as may be prescribed, refer the matter to a medical referee (a)

The medical referee to whom the matter is so referred shall, in accordance with regulations made by the Secretary of State, (b) give a certificate as to the condition of the workman and his fitness for employment, specifying, where necessary, the kind of employment to which he is fit, and that certificate shall be conclusive evidence as to the matters so certified (c)

Where no agreement can be come to between the employer and the workman as to whether or to what extent the incapacity of the workman is due to the accident, the provisions of this paragraph shall, subject to any regulations made by the Secretary of State, apply as if the question were a question as to the condition of the workman.

If a workman, on being required so to do, refuses to submit himself for examination by a medical referee to whom the matter has been so referred as aforesaid, or in any way obstructs the same, (d) his right to compensation and to take or prosecute any proceeding under this Act

(a) *Post*, 660. (b) *Post*, 871. (c) *Post*, 688. (d) *Post*, 682.

in relation to compensation, or, in the case of a workman in receipt of a weekly payment, his right to that weekly payment, shall be suspended until such examination has taken place. (a)

1 P. 1906.
First Schedule.

Rules of court may be made for prescribing the manner in which documents are to be furnished or served and applications made under this paragraph and the forms to be used for those purposes and, subject to the consent of the Treasury, as to the fee to be paid under this paragraph. (b)

(16) Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act. (c)

Provided that where the workman was at the date of the accident under twenty-one years of age and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding fifty per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding one pound. (d)

(17) Where any weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer, be redeemed by the payment of a lump sum of such an amount as, where the incapacity is permanent, would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity for the workman equal to seventy-five

(a) *Post*, 684. (b) *Post*, 684. (c) *Post*, 560, 574. (d) *Post*, 562, 573.

Workmen's Compensation Act, 1906

A.D. 1906
First Schedule.

per cent. of the annual value of the weekly payment, and as in any other case may be settled by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator or judge of the county court to be invested or otherwise applied for the benefit of the person entitled thereto: Provided that nothing in this paragraph shall be construed as preventing agreements being made for the redemption of a weekly payment by a lump sum (c)

(18) If a workman receiving a weekly payment ceases to reside in the United Kingdom, he shall thereupon cease to be entitled to receive any weekly payment, unless the medical referee certifies that the incapacity resulting from the injury is likely to be of a permanent nature. If the medical referee so certifies, the workman shall be entitled to receive quarterly the amount of the weekly payments accruing due during the preceding quarter so long as he proves, in such manner and at such intervals as may be prescribed by rules of court, his identity and the continuance of the incapacity in respect of which the weekly payment is payable (b)

(19) A weekly payment or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same. (c)

(20) Where under this schedule a right to compensation is suspended no compensation shall be payable in respect of the period of suspension. (d)

(21) Where a scheme certified under this Act provides for payment of compensation by a friendly society, the provisions of the proviso to the first subsection of section

(a) *Post*, 553. (b) *Post*, 557. (c) *Post*, 583. (d) *Post*, 601.

eight, section sixteen, and section forty-one of the Friendly Societies Act, 1896, shall not apply to such society in respect of such scheme (a)

(22) In the application of this Act to Ireland the provisions of the County Officers and Courts (Ireland) Act, 1877, with respect to money deposited in the Post Office Savings Bank under that Act shall apply to money invested in the Post Office Savings Bank under this Act (31)

SECOND SCHEDULE.

Second Schedule.
Sections 1, 14.

ARBITRATORS, ETC.

(1) For the purpose of settling any matter which under this Act is to be settled by arbitration, if any committee, representative of an employer and his workmen, exists with power to settle matters under this Act in the case of the employer and workmen, the matter shall, unless either party objects by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the arbitration of such committee, or be referred by them in their discretion to arbitration as hereinafter provided (1)

(2) If either party so objects, or there is no such committee, or the committee so refers the matter or fails to settle the matter within six months from the date of the claim, the matter shall be settled by a single arbitrator agreed on by the parties, or in the absence of agreement by the judge of the county court, according to the procedure prescribed by rules of court. (d)

(a) *Post*, 552. (b) *Post*, 592. (c) *Post*, 623, 626. (d) *Post*, 623.



(3) In England the matter, instead of being settled by the judge of the county court, may, if the Lord Chancellor so authorizes, be settled according to the like procedure, by a single arbitrator appointed by that judge, and the arbitrator so appointed shall, for the purposes of this Act, have all the powers of that judge. (c)

51 & 53 Vict.
c. 49

(4) The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but a committee or an arbitrator may, if they or he think fit, submit any question of law for the decision of the judge of the county court, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, or where he gives any decision or makes any order under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal, (b) and the judge of the county court, or the arbitrator appointed by him, shall, for the purpose of proceedings under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the proceedings were an action in the county court. (c)

(5) A judge of county courts may, if he thinks fit, summon a medical referee to sit with him as an assessor. (d)

(6) Rules of court may make provision for the appearance in any arbitration under this Act of any party by some other person. (e)

(7) The costs of and incidental to the arbitration and proceedings connected therewith shall be in the discretion of the committee, arbitrator, or judge of the county court,

(a) *Post*, 630. (b) *Post*, 624. (c) *Post*, 672. (d) *Post*, 637.

(e) *Post*, 629.

subject as respects such judge and an arbitrator appointed by him to rules of court.^(a) The costs, whether before a committee or an arbitrator or in the county court, shall not exceed the limit prescribed by rules of court, and shall be taxed in manner prescribed by those rules and such taxation may be reviewed by the judge of the county court.^(b)

(8) In the case of the death, or refusal or inability to act, of an arbitrator, the judge of the county court may, on the application of any party, appoint a new arbitrator.^(c)

(9) Where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of court ^(d) by the committee or arbitrator, or by any party interested, to the registrar of the county court who shall, subject to such rules on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a county court judgment.^(e)

Provided that—

(a) no such memorandum shall be recorded before seven days after the despatch by the registrar of notice to the parties interested; and (f)

(b) where a workman seeks to record a memorandum of agreement between his employer and himself for the payment of compensation under this Act and the employer, in accordance with rules of court, proves that the workman has in fact returned to work and is earning the same wages as he did

(a) *Post*, 686.

(b) *Post*, 686.

(c) *Post*, 628.

(d) W. C. R., 1907, rr. 41-47, *post*, 740 *et seq.*

(e) *Post*, 626, 660.

(f) *Post*, 662.

A.D. 1906
second schedule

before the accident, and objects to the recording of such memorandum, the memorandum shall only be recorded, if at all, on such terms as the judge of the county court, under the circumstances, may think just; (a) and

(c) the judge of the county court may at any time rectify the register, (b) and

(d) where it appears to the registrar of the county court, on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum, or an agreement as to the amount of compensation payable to a person under any legal disability, or to dependants, ought not to be registered by reason of the inadequacy of the sum or amount, or by reason of the agreement having been obtained by fraud or undue influence, or other improper means, he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the judge who shall, in accordance with rules of court, make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just; (e) and

(f) The judge may, within six months after a memorandum of an agreement as to the redemption of a weekly payment by a lump sum, or of an agreement as to the amount of compensation payable to a person under any legal disability, or to dependants, has been recorded in the register, order that the record be removed from the register on proof to his satisfaction that the agreement

(a) *Post*, 667.

(b) *Post*, 661.

(c) *Post*, 661.

was obtained by fraud or undue influence or other improper means, and may make such order A.D. 1906
out of Schedule (including an order as to any already paid under the agreement) as under the circumstances he may think just. (a)

(10) An agreement as to the redemption of a weekly payment by a lump sum if not registered in accordance with this Act shall not, nor shall the payment of the sum payable under the agreement, exempt the person by whom the weekly payment is payable from liability to continue to make that weekly payment, and an agreement as to the amount of compensation to be paid to a person under a legal disability or to dependants, if not so registered, shall not, nor shall the payment of the sum payable under the agreement, exempt the person by whom the compensation is payable from liability to pay compensation unless, in either case, he proves that the failure to register was not due to any neglect or default on his part. (b)

(11) Where any matter under this Act is to be done in a county court, or by, to, or before the judge or registrar of a county court, then, unless the contrary intention appears, the same shall, subject to rules of court, be done in, or by, to, or before the judge or registrar of, the county court of the district in which all the parties concerned reside, or if they reside in different districts the district prescribed by rules of court, without prejudice to any transfer in manner provided by rules of court. (c)

(12) The duty of a judge of county courts under this Act, or in England of an arbitrator appointed by him, shall, subject to rules of court, be part of the duties of the county court, and the officers of the court shall act accordingly, and rules of court may be made both for any

(a) *Post*, 661

(b) *Post*, 665

(c) *Post*, 668, 696.

V.D. 1906
Second Schedule

purpose for which this Act authorizes rules of court to be made, and also generally for carrying into effect this Act so far as it affects the county court, or an arbitrator appointed by the judge of the county court, and proceedings in the county court or before any such arbitrator, and such rules may, in England, be made by the five judges of county courts appointed for the making of rules under section one hundred and sixty-four of the County Courts Act, 1888, and when allowed by the Lord Chancellor, as provided by that section, shall have full effect without any further consent. (a)

(13) No court fee, except such as may be prescribed under paragraph (15) of the First Schedule to this Act, shall be payable by any party in respect of any proceedings by or against a workman under this Act in the court prior to the award. (b)

(14) Any sum awarded as compensation shall, unless paid into court under this Act, be paid on the receipt of the person to whom it is payable under any agreement or award, and the solicitor or agent of a person claiming compensation under this Act shall not be entitled to recover from him any costs in respect of any proceedings in an arbitration under this Act, or to claim a lien in respect of such costs on, or deduct such costs from, the sum awarded or agreed as compensation, except such sum as may be awarded by the committee, the arbitrator, or the judge of the county court, on an application made either by the person claiming compensation, or by his solicitor or agent, to determine the amount of costs to be paid to the solicitor or agent, such sum to be awarded subject to taxation and to the scale of costs prescribed by rules of court. (c)

(15) A committee, arbitrator, or judge may, subject

(a) *Post*, 674.

(b) *Post*, 674.

(c) *Post*, 691.

to regulations made by the Secretary of State and the Treasury, submit to a medical referee for report any matter which seems material to any question arising in the arbitration (a)

(16) The Secretary of State may, by order, either unconditionally or subject to such conditions or modifications as he may think fit, confer on any committee representative of an employer and his workmen, as respects any matter in which the committee acts as arbitrators, or which is settled by agreement submitted to and approved by the committee, all or any of the powers conferred by this Act exclusively on county courts or judges of county courts, and may by the order provide how and to whom the compensation money is to be paid in cases where, but for the order, the money would be required to be paid into court, and the order may exclude from the operation of provisions (c) and (c) of paragraph (9), of this Schedule agreements submitted to and approved by the committee, and may contain such incidental, consequential, or supplemental provisions as may appear to the Secretary of State to be necessary or proper for the purposes of the order. (b)

(17) In the application of this Schedule to Scotland—

(a) "County court judgment" as used in paragraph (9) of this Schedule means a recorded decree arbitral:

(b) Any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by section fifty-two of the Sheriff Courts (Scotland) Act, 1876, save only that parties may be represented by any person authorized in writing to appear for them and subject to the declaration that it shall be competent to either

(a) *Post*, 624.

(b) *Post*, 625.

A.D. 1906
Second Schedule.

party within the time and in accordance with the conditions prescribed by act of sederunt to require the sheriff to state a case on any question of law determined by him, and the decision thereon in such case may be submitted to either division of the Court of Session, who may hear and determine the same and remit to the sheriff with instruction as to the judgment to be pronounced, and an appeal shall lie from either of such divisions to the House of Lords;

(c) Paragraphs (3), (4), and (8) shall not apply. (a)

(18) In the application of this schedule to Ireland the expression "judge of the county court" shall include the recorder of any city or town, and an appeal shall lie from the Court of Appeal to the House of Lords. (b)

Section 8.

THIRD SCHEDULE

Description of Disease	Description of Process
Asphyx (c) - -	Handling of wood, bark, fish bone, and skins
Lead poisoning or its sequelae (d)	Any process involving the use of lead or its preparation or compounds
Mercury poisoning or its sequelae	Any process involving the use of mercury or its preparations or compounds
Phosphorus poisoning or its sequelae	Any process involving the use of phosphorus or its preparations or compounds
Arsenic poisoning or its sequelae	Any process involving the use of arsenic or its preparations or compounds
Ankylostomiasis - -	Mining.

(a) Post, 629 n

(b) Post, 673.

(c) Post, 364

(d) Post, 366

Where regulations or special rules made under any Act of Parliament for the protection of persons employed in any industry against the risk of contracting lead poisoning require some or all of the persons employed in certain processes specified in the regulations or special rules to be periodically examined by a certifying or other surgeon, then, in the application of this schedule to that industry, the expression "process" shall, unless the Secretary of State otherwise directs, include only the processes so specified (a)

A.D. 1906
First Schedule.

CHAPTER VII

THE RIGHTS CONFERRED

WE have now to consider the Workmen's Compensation ^{New principle,} legislation of 1906. As before noticed, (a) the Workmen's Compensation Act, 1897, introduced a new principle into English law. The Act of 1906 repeals the earlier legislation and, sweeping away its exceptions and limitations, enacts that employers in any employment are responsible ^{Summary} to their workmen for personal injury by accident arising out of and in the course of the employment, in all cases where the injury is of a character which disables the workman for at least one week from earning full wages at the work at which he was employed, (b) and provided that he is not shown to have brought the injury on himself by "serious and wilful misconduct", (c) "unless the injury results in death or serious and permanent disablement." In this event, though the "serious and wilful misconduct" may have caused the death or ruin or both of the employer, the cause of it, the workman, in the case of his permanent disablement is entitled to draw a weekly payment not to exceed £1, or, in the case of his death, his dependants are to receive a sum between £150 to £300 from the employer or his estate, (d) payment of which may be enforced by ordinary process of execution (e) or by a committal order under

(a) *W. 7.*

(b) *S. 1 (2) (a) Act, 2nd*

(c) *S. 1 (2) (c). Act, 300.*

(d) See definition of "employer," s. 13. *Act, 319*

(e) *W. C. R. 1907, v. 67. Post, 757.*

Chap. VII. the Debtors Act, 1869 (a) The week's disability is a condition precedent to the Act applying; but when that condition is complied with, even though the employer has continued paying full wages, the workman is no less entitled to statutory compensation. He is brought within the Act by the fact of a week's disability from earning full wages at the work at which he was employed. (b) where the disability is brought about by an accident arising out of and in the course of the employment, and has *prima facie* a right to compensation.

We have already considered the constituents that go to make up personal injury in law (c). We must now ascertain the meaning of the terms "accident," "arising out of and in the course of the employment," and "serious and wilful misconduct," as these are steps to arrive at an accurate notion of the liability imposed.

ACCIDENT

There is no definition of accident in the Act, and the meaning of accident, as applying to insurance cases and which has already been considered, is not comprehensive enough here. The principle to be adopted in interpreting an accident under the Act has been thus enunciated by Lord Macnaghten (d):

Statement of
principle by
Lord Mac-
naghten.

"The expression 'injury by accident' seems to me to be a compound expression. The words 'by accident' are, I

(a) 22 & 23 Vict. c. 62. *Barley v. Plant*, [1901] 1 K. B. 411, W. C. R. 1907, 1 168. *Post*, 7 67.

(b) *Chandler v. Smith*, [1899] 2 Q. B. 506, followed in Scotland, *Freeland v. Macfarlane* [1900], 2 F. 432, *Gr. N. of Scotland Ry. Co. v. Fraser*, 38 So. 1, R. 153. An offer of employment is *some* evidence of earning capacity, but is not conclusive.

(c) *Intro*, 49 *et seqq.*

(d) *Fenton v. Thorley & Co.*, [1903] A. C. 443 at 448.

think, introduced parenthetically as it were to qualify the word 'accident' or the word 'injury' or the compound expression 'injury by accident.' I rather think that the latter view is the correct one. If it were a question whether the qualifying words apply to 'injury' or to 'accident' there would, I think, be some difficulty in arriving at a conclusion. The truth is that in the Act, which does not seem to have had the benefit of careful revision, 'accident' and 'injury'—that is, injury by accident—appear to be used as convertible terms; for instance, in sec. 2, 'notice of the accident' has to be given, and that notice is referred to immediately afterwards as 'notice in respect of an injury under the Act'. I come, therefore to the conclusion that the expression accident is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed" (a). This negatives the other view which had up to this time prevailed—that there must be first a personal injury; second, that there must be an accident causing it; third, that such accident must be the "proximate cause of the injury, and that nothing more remote than the proximate cause can be properly taken into account" (b).

In *Bruton v. Turvey* (c) the anthrax case—*Matthew, Bruton v. Turvey*, L.J., states the effect of *Feldon v. Thorley* thus: "Where the injury to the workman arises from a cause that is unforeseen, the element which constitutes an accident within the meaning of the Act arises"—a compendious form of expression, the logical exactitude of which may be

(a) See *Hornsey Local Board v. Monarch Investment Building Society* (1891, 21 Q. B. D. 4, 5). Cases, Statute Law, 67, The Factory and Workshop Act, 1901 (1 Edw. VII. c. 21), ss. 19-22.

(b) [1903] 4, C. at 454.

(c) [1904] 1 K. B. 828 at 836.

Chap. VII. doubtful even to the author of it, in view of his preceding sentence, "A number of illustrations, each of which was more difficult than the case before us, were brought to our notice, but I do not propose to follow the learned counsel into those cases."

In *Brintons v. Turvey*, the argument was narrowed down to the point whether an injury by disease, under the Act of 1897, could be called an injury by accident. The Court of Appeal held that *Fenton v. Thorley* went thus far. In the House of Lords Lord Roberts *ad. (a)* who was of the contrary opinion, said: "Anthrax is a disease, and unless the contracting of infectious disease (as it arises out of and in the course of the employment) is 'accident' in the sense of the Act, I do not see how this judgment can stand. If it does stand, then in every case in which a man dies of any infectious disease (his taking which arose out of and in course of his employment), all he has got to do is to get the doctor to prove (what could not be disputed) that a bacillus did it, and the accident is there." The decision of the House, however, went with Lord Macnaghten, who adhered to his opinion in *Fenton's* case. Speaking of *Turvey's* case, he said: *(b)* "I cannot doubt that the man's death was attributable to personal injury by accident arising out of and in the course of his employment. The accidental character of the injury is not, I think, removed or displaced by the fact that, like many other accidental injuries, it set up a well-known disease, which was immediately the cause of death, and would no doubt be certified as such in the usual death certificate."

Collins M.R.'s criticism.

Collins, M.R., criticizes Lord Macnaghten's opinion in *Fenton's* case in *Steel v. Gamwell, Land & Co.*, *(c)* which

(a) [1905] A. C. 285.

(b) [1905] A. C. 231.

(c) [1905] 2 K. B. 292 at 298.

was a case of lead poisoning producing partial paralysis. Chap VII.
 Collins, M R, found it "difficult to extract guidance from that case" (Fenton's). He then says, "turning to the facts of the case, I find that the injury to the applicant was lead poisoning, which was brought about through the applicant being situated with lead in consequence of his being in continuous contact with it. According to the medical evidence this might have come about by inhalation, or by the lead getting into his system with his food or by absorption through the skin. In any case the result must have come about through long exposure to contact with the lead, and gradually, not suddenly. It is not possible to indicate any precise time at which the mischief arose. It seems to me that the provisions of sec 2 of the Act show that what is dealt with are cases in which a date can be fixed, as that on which the injury by accident came about. I am unable to find such a date in this case. It has been suggested that there were a series of accidents by the continuous absorption of lead, by one or other of the three processes named; but this suggestion does not meet the difficulty which arises from the provisions of the Act, as to notice of the particular date of the accident or the injury."

The next day the same Court had to consider a similar difficulty,^(a) in two cases where the incapacity arose from infirmities known respectively as "beat hand" and "beat knee", that is to say, that the hand and the knee in the respective cases became numbed by the gradual formation of an abscess brought about in the one case by using the pick, and in the other by the friction caused by the applicant wielding the pick while kneeling. In each case the injury was caused by the gradual process of continued friction. Collins, M R, referred to his remarks in

Marshall v. East Holywell Coal Co.

Gorley v. Owners of Backworth Collieries.

(a) *Marshall v. East Holywell Coal Co.*, 21 T. L. R. 494, *Gorley v. Owners of Backworth Collieries*, *ibid.*

Chap. VII. the preceding case "as to the difficulty of finding a meaning for the word accident from which the element of hap-hazard was eliminated, but he fell back upon this, which remained after the decision of the House of Lords, that the accident must be something which was capable of being assigned to a particular date, and which was in the popular and ordinary sense an accident. These conditions were not fulfilled in the present case"

*Thompson v
Ashington Coal
Co.*

The distinction taken in these cases is marked by *Thompson v Ashington Coal Co. (a)* where a piece of coal worked its way under the skin of the knee of a coal miner (who had often to work kneeling) and caused inflammation and incapacity. This was held an accident within the Act. The date of the occurrence could be fixed.

*Golder v.
Caledonian Ry
Co.*

Golder v Caledonian Ry Co (b) is an earlier case, but presents a different phrase of the question what is an "accident." The workman was "affected with nephritis, a disease which was likely to prove fatal to him, though probably not for a few years." In these circumstances he was injured in his employment. The sheriff also found as a fact that his death was accelerated from the shock to his system resulting from the accident. The Lord President held that "when but for the accident the person would not have died at the time at which, and in the way in which, he did die, the accident must, in my judgment, be held to have been the cause of his death in the sense of the Act." (c)

(a) [1901] 81 I. T. 11.

(b) 5 F. 123. S. 121 Law Times newspaper 523.

(c) In *Willoughby v. G. W. Ry. Co.* (1901), 11 W. C. 28. 117 Law Times newspaper, 28, the test given is: "If the inability to follow employment is due solely to the presence and normal development of the disease no further compensation is payable, but, otherwise, if the progress and intensity of the disease has been accelerated and aggravated by the accident."

The other aspect is presented by *Wurnock v Glasgow* Chap. VII. Iron & Steel Co., (a) where a man seventy-nine years of age had a stone fall on his foot and in consequence was obliged to leave work. His physical condition generally was lowered, and he never regained his former standard of health. A month after this accident by his doctor's advice he returned to work. A fortnight afterwards he was taken ill at his work and fainted. Ten days afterwards he had an apoplectic stroke, and two days later he died. The sheriff found that it had not been proved that death was accelerated by the accident, and the Court dismissed an appeal holding that the position was one of fact only.

This *per se* decision has had the approval of the House of Lords in circumstances so clear that the only wonder is that the case ever got so far. (b) A workman was injured, and from the date of the accident his employers paid him half wages till an agreement and a memorandum of it registered under the Act was made by which the workman was to have 18s a week so long as his incapacity lasted. This sum was paid him weekly for more than a year, when the man died. The dependants then applied for compensation under the Act. The deputy judge in a written judgment said that "the evidence did not satisfy him that the death was caused or to any appreciable extent accelerated by the accident, but found as a fact that the sole cause of Cleverley's incapacity to work was" an obscure disease from which he was suffering, symptoms of which were present at the time of the accident, and of which disease alone he died. He supplemented this by a most extraordinary finding, "that the respondents were estopped from denying that the disease which caused the death was the result of the accident *by reason of the*

(a) 6 F. 474. (b) *Cleverley v Gas Light & Coke Co*, 24 T. L. R. 98.

Chap. VII. *agreement as to which they had entered and the continued payments which they had made.*" The Court of Appeal held that there was no case of estoppel, and the House of Lords affirmed them without calling on the respondents. Lord Halsbury pointed out that "the County Court was the deciding tribunal on all questions of fact, and the judge had found that the death was not caused by the accident."

Whatever the consequences of the injury, so long as it is proved that they are the consequences, they are to be attributed to the injury whether they are natural and probable consequences of it or not; and the previous condition of health of the workman is not material (a).

* *Bruderick v. London County Council.*

The meaning of "accident" in the Act of 1906 was before the Court of Appeal in *Bruderick v. London County Council* (b). The Applicant was a sewer man who had suffered from enteritis caused by the inhalation of sewer gas, which aggravated existing heart disease and incapacitated him. Cozens-Hardy, M.R., affirming the County Court judge, said that this was "not injury by accident," that the anthrax case (c) was explained by having regard to the special finding of the County Court judge, that ordinarily the operation of disease was not an accident within the Act, and that this was conclusively established not only by the remarks of Lord Lindley in *Turney's* case, but also by the new Act separating certain "industrial diseases" from the rest and providing for them in the Act.

Imray, Imrie & Co. v. Williamson.

The determination of what is accident again came before the House of Lords on Appeal from the Irish

(a) *Dunham v. Clau*, [1902] 2 K. B. 296. *Wicks v. Howell*, [1906] 2 K. B. 225. Case of a fall while in an epileptic fit, the workman having had fits on three previous occasions. *Id.*, 67.

(b) [1906] 2 K. B. 807.

(c) *Buntons v. Turvey*, [1905] A. C. 230.

Courts in *Ismay, Imrie & Co. v. Williamson*, (a) which had awarded £162 compensation to the widow of one Williamson who had died from heat stroke while working as trimmer on the *ss. Hopestar*. When about to leave New York three men were needed for the ship, and the Seaman's Mission supplied Williamson as one of them. He had been starving and had applied to the said mission for work. "He seems to have been a miserable creature physically, undersized, undeveloped, and so emaciated that, as one of the witnesses says, 'his bones protruded'." The work of a trimmer is not heavy in itself. It is, no doubt, trying work, owing to the heated atmosphere of the stoke-hole where trimmers work, taking out the ashes of the furnaces. The men work in shifts—four hours on and eight hours off. The deceased had no experience of such work. He got through two shifts. On his third turn after about an hour's work he had a 'heat stroke,' as it is called. He went on until he dropped in a faint. He was carried to hospital, recovered partially, then became violent and died from exhaustion two hours after leaving the stoke-hole." The above statement is taken from the opinion of Lord Macnaghten, who asks, "Was that an injury by accident in the ordinary sense of the expression?" "This was with reference to his badship's expression in *Fenton v. Thorley*; (c) "I come, therefore, to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed," and which was adopted by the House. Lord Loreburn, C., answered: "In my view this man died from an accident." "In common language it was a case of accidental death." "What killed him was a heat stroke

(a) [1903] A. C. 147, Holmes, L.J., dissenting in the Irish Court of Appeal.

(b) [1903] A. C. at 448.

Chap. VII, coming suddenly and unexpectedly upon him while at work." The other aspect is put by Lord Macnaghten. The expression of the Act, "personal injury by accident," would, he said, "be equally applicable or equally inapposite in the case of an attack of bronchitis or pneumonia brought on by a sudden and violent chill disregarded or neglected at the outset." "The death was due to the physical state of the workman and 'the nature' of the employment, to use the language of section 8, subsection (i). It was, I think, just what anybody would have expected who saw the man and knew what a trimmer has to do. Add the fact that the man was wholly inexperienced, ignorant of what ought to be done in cases of emergency, and the result would be a foregone conclusion." Lord Ashbourne held the balance between these views. He solved the question thus: "With great deference to those who hold a contrary opinion, I can myself see no room for doubt on the subject. Everything was in the course of his [Williamson's] employment and arising out of it. But for the boiler and the heat stroke, and the speedy exhaustion it caused, there would have been no accident. If the Act is to be interpreted according to its 'ordinary and popular meaning,' "would not the generality of mankind say that what occurred was an injury caused by an accident?" To an intelligence less perspicacious than that of Lord Ashbourne there may seem room for doubt whether a death in the circumstances set out above would be ordinarily and in popular phrase described as an accident; unless in the sense that accident is synonymous with occurrence. In this sense every permutation in time or space is an occurrence; but some narrower meaning than this seems confessed to be that to be placed on the term in the Act. This much is allowed, *Fenton v. Thorley* is "a conclusive authority." *Ismay, Iurie & Co. v.*

Chap VII. matter for compensation under the classification of "industrial diseases."

Defined.

An industrial disease is one which (a) "is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension," (b) and which is mentioned in the Third Schedule of the Act, or by an order of the Secretary of State under sec. 8 (6) (c).

The Third Schedule (b) specifies anthrax, lead, mercury, phosphorus, or arsenic poisoning and their sequelae, and besides ankylostomiasis, (c) while under the powers given to the Secretary of State an order has been issued including eighteen more diseases, sufferers from which may obtain the advantages of the Act if otherwise entitled. (f)

To obtain the benefit of sec. 8 of the Act for a workman or his dependants—

The workman must either (1) be certified to be suffering from one of the above indicated diseases, and to be disabled from earning full wages by the certifying surgeon for the district in which the workman is employed, appointed under the Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), secs. 122-124; (a)

(a) S. (1) Act, 311

(b) This refers to a person of a workman who has had employment in pursuance of special rules or regulation made under the Factory and Workshop Act, 1901, on account of having contracted a disease mentioned in the Third Schedule of the Workmen's Compensation Act, 1906.

(c) *Idem*, 315

(d) *Idem*, 312

(e) A disease caused by the presence in the human (c) (f) of a parasitic worm, to which miners are sometimes exposed.

(f) Appendix B *Post*, 850

(g) By s. 8 (3), the Secretary of State may make rules regulating the duties and fees of certifying and other surgeons (including dentists) under this section. See Regulations dated 21st June, 1907. Appendix B, *Post*, 852.

- or (2) he suspended from his employment, on account Chap. VII.
 of having contracted any of the above-mentioned
 diseases, in pursuance of regulations for dangerous
 trades made under the powers given by the
 Factory and Workshop Act, 1901 (1 Edw VII c
 22, sees 70-86, *ac*)
 or (3) have died from the effect of a scheduled in-
 dustrial disease.

One or other of these sets of conditions being complied with, the workman or his dependants "shall be entitled to compensation under this Act as if the disease or such suspension as above said were a personal injury by accident arising out of and in the course of that employment" (*b*).

The difficulty that the former law, as pointed out in *Steel v Cammell, Laird & Co*,¹ was overcome by requiring "notice of accident" to be given, was overcome by enacting that "the disablement or suspension shall be treated as the happening of the accident" (*d*). But a representation by the workman on entering the employment that he had not previously suffered from the disease in respect of which a claim is made, disentitles him to compensation but only if such representation is in writing and was "wilfully and falsely" made. (*c*) If "wilfully and falsely" is the equivalent of fraudulently, this subsection makes an inroad upon the doctrine of the common law, for "by the law of England fraud cuts down everything." (*f*) I believe

(a) An appeal from the certifying or other surgeon is given to a medical referee to be appointed by the Secretary of State. See Regulations of 21st June, 1907 in Appendix B. *Post*, 842.

(b) S. 8 (1). *Acet*, 312.

(c) [1905, 2 K. B. 232.

(d) S. 8 (1) (a). W. C. R. 1907, r. 39 (2), provides for notice of disablement. *Post*, 748.

(e) S. 8 (1) (b).

(f) Pollock, C. B.

Chap. VII. — that is the common mode of expressing a legal proposition known to every lawyer in Westminster Hall. The law sets itself against fraud to the extent of breaking through almost every rule, sacrificing every maxim, getting rid of every ground of opposition which may be presented so as to prevent it from succeeding. So much does the law of England abhor fraud that even the maxim that you can never aver against the record is not allowed to prevail if fraud can be shown, and probably there is no maxim more stringent than that you cannot aver against the record. The law will not allow technical difficulties of any kind to interfere to prevent the success of right and justice and truth." Thus speaks the wisdom of the common law. (a)

But *corroboratio minus est a iure allentis*. By this provision of the Workmen's Compensation Act the grossest fraud may be successful if not in writing. The law, however, produces the antidote, and as the Act comes into use all representations of this character will be required to be in writing.

Where develop-
ment of disease
is gradual

As the development of disease may be slow and is often obscure, it may be due to work done during the twelve months under more than one employer. In such case the compensation is to be recoverable from the last employer.

But a difficulty may occur, and often does occur, in tracing the history of the workman for a twelvemonth. Provision is accordingly made by the Act (b) that if required to do so the workman, or in case of his death his dependants, shall afford "such information as to the names and addresses of all the other employers who employed him in the employment" "as he or they may possess." If enough information is not given to enable the employer to bring in

(a) *Rogers v Hadley*, 32 L J Ex 248.

(b) s 8 (1) (c) (i)

a previous employer as respondent against whom he may proceed for indemnity, the employer "upon proving that the disease was not contracted whilst the workman was in his employment shall not be liable to pay compensation" But if the information is given, there is a choice for the employer either to use it and bring in another respondent, or to defend on his own case. If he defends on his own case he is bound to pay the compensation on proof of the applicant's case, whether the disease originated during the period of the workman's service with him, or whether at any other period of the twelve months' service in the employment to the nature of which the disease was due. The wording at first sight is a little odd, as if in a particular case a right is given to an employer to prove that the disease was contracted at a period when the workman was not in his service. A reference to the following proviso makes the matter clear. If after taking the steps indicated by the Act the employer has not the information at hand to bring in a predecessor, then he may prove that the disease was not contracted in his employment. If he has this information, that proof will not avail unless he brings the proper person before the tribunal.

The workman is not concerned in the first instance with his employers' contention *ad hoc* whether any one of them is entitled to exoneration (*a*) or to contribution (*b*). The claims to indemnity or to contribution are provided for as separate cases. If the employer proceeded against disputes that the disease was contracted whilst the workman was in his service and alleges that it was while in the service of another employer, such employer is to be added as a respondent, (*c*). The workman has his right to compensation

(a) S. 8 (1) (i) (ii) *Ante*, 313.

(b) S. 8 (1) (c) (iii)

(c) W. C. R. 1907, r. 30 (4) (a) *Post*, 738.

Chap. VII. against employer No. 1 till the liability of employer No. 2 is established. Then No. 1 is discharged and No. 2 is substituted as the one against whom the compensation is recoverable.

Contribution. On the other hand, if the employer's claim is for contribution, (a) he may bring in such other employer or employers as third parties under W. C. A. R. 1907, 19-23, 25 and 26, and these rules, which apply primarily to indemnity under secs. 4 and 6, are to be moulded to apply to a claim for contribution.

To make out a case for contribution in this regard the disease must be "of such a nature as to be contracted by a gradual process." Lead, mercury, phosphorus and arsenic poisoning come in this classification and some at any rate of the diseases named in the Order of 22nd May, 1907.

Two possible
constructions of
s. 5 (1) (c) (iii)

Two meanings of this sub-section at least are possible. It may mean (1) that in the case of an employment in which working for a twelvemonth is likely to cause disease by a gradual accumulation the compensation payable when a disease of such a nature has befallen a workman is in no case to fall on the last of several employers, but it is to be apportioned amongst them: that in certain employments the burden of the "insurance of industry" should be divided amongst the employers in whose service the workman had been for the preceding twelve months, in such proportions as are determined by the arbitrator.

Or it may mean (2) that in the case of diseases that are usually contracted by a gradual process, finding proof of the actual incidence of the disease, the employers of the workman for twelve months past are to divide payment of the compensation between them; but that, though the disease

(a) S. 8 (1) (c) (iii) *Ante*, 313

is "of such a nature as to be contracted by a general process," if in point of fact in any case this has not happened, and the history of the disease is satisfactorily proved, then only those employers in whose service the disease was contracted or developed are to contribute to the compensation. While the former interpretation is not at all out of character with the provisions of the Act, the latter (this is possibly quite an insignificant coincidence) is more in accord with the principles of the common law. We must besides note that the suggested widening of the principle of compensation is contained in a *proviso* "which"—the rule is old and well established—"must be construed with reference to the preceding parts of the clause to which it is appended", (c) and by proviso (1) of the same clause "the employer upon proving that the disease was not contracted whilst the workman was in his employment shall not be liable to pay compensation."

Any difficulty there may be arises from the logical vagueness in the drafting of the Act. "Disease" in this connection is indeed Protean. In the Third Schedule disease is *non a generalissimum*, it is a *summu genus*, in sec. 8 its meaning oscillates between the *summu genus* and the *infima species*. In sec. 8 (1) (i) the meaning is as in the Third Schedule; later on in the phrase "as if the disease or such suspension as aforesaid were a personal injury by accident" it is an *infima species*, the particular case of the particular workman whose disablement is the subject of inquiry. In sec. 8 (1) (c) in the phrase "if the disease is of such a nature as to be contracted by a gradual process" may indicate either. The latter view probably is that there it means: if the particular manifestation of the disease in the case of the workman about whom inquiry is

Ambiguous
wording

(a) *Ex parte Partington*, 6 Q. B. 649, 653.

Chap. VII**Haylett v
Vigor & Co.**

being made is in the actual case contracted, etc., then it accords with the words cited above from (1) of the same proviso; and the employer who shows that the disease, though capable of being contracted by a gradual process was, in the actual case in arbitration, contracted at a period when the workman was not in the employment may go free of contributing to compensation. Against this there is the further ambiguity in the words "to be contracted", if they had been "to be capable of being contracted" they would be clear one way, if they were "to have been contracted" they would be clear the other.

**Rules of inter-
pretation.**

The rules for the interpretation of statutes applicable are—

(1) If "the precise words used are plain and unambiguous we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice," (a)

(2) "Where there are two meanings, each adequately satisfying the meaning (of a statute) and great harshness (b) is produced by one of them, that has a legitimate influence in widening the mind to the other. It is more probable that the legislature would have used the word ('evade') in that interpretation which least offends our sense of justice." (c)

The only doubt that arises is where a disease which is ordinarily of "such a nature as to be contracted by a"

(a) *Alley v Dale* (1851), 20 L. J. C. P. 231, per Jervis, C. J. at 235; *Capell v. G. W. Ry. Co.* (1853), 11 Q. B. D. 315, per Brett, M. R., at 318.

(b) But "great harshness" without ambiguity avail not at all. "I utterly repudiate the notion that it is competent to a judge to modify the language of an Act in order to bring it in accordance of his views of what is right or reasonable" per Willes, J., *Alley v. Dale*, L. R. 10 C. P. 365 at 371.

(c) *Simmons v Registrar of Probates*, [1900] A. C. 323, per Lord Haldane at 335. See Brett, J.'s three canons of construction in *Gover's case*, 1 Ch. D. 182 at 198.

gradual process" has in a particular case been proved not to have been so contracted but to have had its origin in definite circumstances in one employer. Is proof of this admissible under the ambiguity of the words used, or does the Act constrain an absolute presumption to the contrary? In all other cases where the workman is found with the disease but the time of the origin of it is left uncertain, the employers for whom he has worked during the preceding twelve months are to be liable to make "such contributions as, in default of agreement may be determined in the arbitration under this Act for settling the amount of the compensation." (a)

Chap. VI
101—The small
contracted by
gradual process
proved not to be
so in particular
case.

In any of the cases we are considering the compensation is to be calculated with reference to the earnings of the workman under the employer from whom the compensation is recoverable (a). This is presumably the employer who gives wages most beneficial to the workman, that one who has last employed him (a), but if he is able to show that the disease was not contracted whilst the workman was in his employment, where insufficient information is furnished by the workman under (a), or where he proves that the disease was in fact contracted whilst the workman was in the employment of another employer under (a), the employer in the first case goes free, and in the second case the compensation is recoverable with reference to the earnings of the workman under the employer who is brought into the arbitration by means of the procedure under W. C. R. 1907, r. 39 (b).

The employer to whom notice of death, disablement, or suspension is to be given is, as is implied by sub-sec. 1 (c), the one who last employed the workman previous thereto (d).

(a) S. 8 (1) (c) (a).

(c) S. 8 (1) (c). *Ante* 312.

(b) S. 8 (1) (d).

(d) S. 8 (1) (c).

Chap. VII. This will be discussed more conveniently when notice is dealt with generally.

Onus altered.

In the Third Schedule (a) there is a column containing a description of the processes which are to be regarded as conducive to the diseases mentioned in the first column; as, for example, "and handling of wood, hair, bristles, hides, and skins" is regarded as a possible antecedent to anthrax. When, then, any workman has been engaged in any of these processes and is found suffering from anthrax "immediately before the date of disablement or suspension," the common law *onus* of proof which would require the workman to give *prima facie* proof of the connection between the two states is abrogated. *Post hoc ergo propter hoc* is under this statute now the rule in this connection. The presumption is made that the disease arose from the nature of the employment, and thus the employer is put to disprove, if he wishes to contest liability. (b)

Appeal from surgeon's certificate.

There is an exception to this where the certifying surgeon certifies that the disease, or the particular invader of disease, was not due to the nature of the employment. There is an appeal from the surgeon's certificate. (c) But if there is no appeal the words of the section would seem to have their natural operation by leaving the common law to apply, and the workman would be entitled to take on himself the proof that his incapacity did arise from the nature of the employment, for he is excepted from the benefit of the subsection, but not from any other benefit of the Act. A long way the best course will be to appeal, for the surgeon is sure at the institution to be called against him. But suppose the particular illness is a species of

(a) *ibid.*, 312

(b) S. 8 (2). The rule of the common law and under the Act of Parliament outside this the action is stated by Collins, M.B., in *Pumtrey v. Lancashire & Y. Ry. Co.*, [1903] 2 K. B. 718 at 721, explained *Fitzgerald v. W. G. Clark & Son*, [1906] 2 K. B. at 799. *Leahy*, 369. (c) S. 8 (4) (f).

anthrax which does not arise from working at any of the processes enumerated in the schedule? There does not seem any reason why he is not entitled to recover by virtue of sec. 1 (1) "he sustains personal injury in his employment by accident arising out of and in the course of his employment. Prove this, and he is within the purview of *Hinton's, Ltd. v. Tinsley (a)*"

Chap. VI

But then comes the instance of "lead poisoning or its sequelæ," which is to cover "any process involving the use of lead or its preparations or compounds." The schedule, however, contains a limitation "where regulations or special rules made under any Act of Parliament for the protection of persons employed in any industry against the risk of contracting lead poisoning require some or all of the persons employed in certain processes specified in the regulations or special rules to be periodically examined by a certifying or other surgeon, then in the application of this schedule to that industry the expression 'process' shall, unless the Secretary of State otherwise directs, include only the processes so specified." (b) Thus any process not so specified is outside the operation of sec. 8. Suppose such a case, and arbitration proceedings commenced under sec. 1, *Steel v. Cammell, Laird & Co. (c)* is still good law. But by the Order of the Secretary of State of the 21st June "handling of lead or its preparations or compounds" is included. If the process which is outside the schedule, and is not an accident because of *Steel's case*, is now included there is a right given under sec. 8 (d). The same considerations apply in all the other cases.

(a) [1906] A.C. 230.

(b) The (c) of the Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), n., Regulations for dangerous trades, s. 79-86. For the orders, see Redgrave Factory Act.

(c) [1906] 3 K.B. 232.

(d) For the practice, see W.C.R. 1907, 1-39. *Post*, 738; and W.C.R., 1908, 1-2. *Post*, 836.

Chap. VII. *Steel v. Cannell, Laird & Co.*, though still of authority outside this section, is of no avail against an applicant proceeding under it. There the difficulty was to give the date of an illness of the slowly cumulative sort: one contracted by a gradual process. Here by sub-sec. (1) the date of disablement "shall be such date as the certifying surgeon certifies"; or if he is unable to give a date, then the date of the certificate itself. Only in the case of a successful appeal from the certifying surgeon the date is to be filled in by the medical referee, and where the workman dies and has not got a certificate of disablement, or is at the time of death not in receipt of a weekly payment on account of disablement, the date is the date of death *viz.* If the workman, who subsequently dies, has a certificate of disablement, the date of disablement is the date given in the certificate, and if he was in receipt of a weekly payment under sec. 8 (1) (ii), then the date of suspension.

Haylett v. Vigor & Co.

The interpretation of sec. 8, sub-sec. 1 and 2, came before the Court of Appeal in *Haylett v. Vigor & Co. (d)*. The point for decision was whether, in the event of a man dying from a disease which is a sequel of any of the industrial diseases specified in the Third Schedule, it has to be established that the industrial disease is either the proximate or ultimate cause of the death, or whether this is to be assumed in the absence of evidence to the contrary. The Court decided in favour with the general law that evidence of causation must be given. "In short, it must be proved that death was a consequence of lead poisoning in the case of this particular individual, not necessarily a direct or immediate consequence, but at least a remote consequence" under sub-sec. 2, which presupposes death caused by a disease mentioned in the Third Schedule.

(a) S. 8 (1) (a) (b). *Ante*, 311.

(b) [1908] 2 K. B. 837.

Haylett, a painter, worked for one employer for years ; he then took employment with another and worked for three or four days, when he suffered from signs of lead poisoning. He went into hospital, but before then all symptoms of it had passed away, yet he died in a week, and, as the County Court judge found, from "granular kidney." Granular kidney is a sequela of lead poisoning, also of gout, of alcoholism, heart pressure, and other complaints. Lead poisoning was not proved to have been the cause of the granular kidney, nor was any cause shown. The County Court judge gave compensation, £250, against the old employers. The Court of Appeal reversed him, and held that the defendants were not entitled. "When cases," says Cozens-Hardy, M.R., "it has been proved that death was caused by lead poisoning or its sequela in the sense in which those words must be interpreted, then the burden of proof is thrown upon the employers of the deceased painter to make out that death was not due to the nature of the employment at the date of the disablement. It was under this subsection that Messrs. Vigor, who were Haylett's last employers, were relieved from responsibility by the learned County Court judge. This subsection (sub-sec. (2) as to which it was argued that it enlarges the scope of the section, and throws upon the employer the burden of proof' does not create a liability. Its only use is to saddle the liability upon the proper person. It deals only with evidence, and it has no effect whatever until the applicant has brought the case within the operation of the earlier part of the section." "Sub-sec. 2," says Farwell, L.J., "has no application to a case like the present ; it only comes into operation when lead poisoning, or a disease consequent on lead poisoning, has been proved, and it then raises an inference in favour of the claimant that lead poisoning—as either the immediate or ultimate cause of death—being proved, such disease was caused by

Chap VII.

Haylett v
Vigor & Co.

Chap. VII. employment in work where lead was handled, an inference which is reasonable enough if death is proved to have been due to lead poisoning directly, or as the *causa causans*, but quite unreasonable if death may more probably or as probably have resulted from goit or alcohol, and no evidence of lead poisoning at all has been given."

Kennedy, L.J., notices a further point, whether "this sec 8 applies only to cases in which the 'process' mentioned in the Third Schedule is carried on under conditions to which the Factory and Workshops Act, 1901, would be applicable. It seems to me that language is used in portions of sec 8 (1) and (2) which appears to lend support to such a contention, but it is unnecessary to decide the question in the present case, and I mention it only that it may not be inferred from silence in regard to it that I have formed a definite opinion against such an interpretation of this portion of the statute."

Arbitration.

The twelve months are to be reckoned as calendar months (a). At the arbitration the judge or arbitrator is to decide all questions, both between applicant and respondents, and also all added respondents, and may make such order as will settle all questions in the arbitration, and such order as to costs as may be just, whether between original or added parties (b).

Mutual Trade Insurance Co.

There is further provision for the establishment under safeguards of a mutual trade insurance company for insuring against the risks under this section, but with so many preliminaries, safeguards, limitations, and confirmations, that sec. 8, sub-secs 7, 8, 9, are not likely largely to be used. The rights of workmen to recover apart from this section are unaffected by it. (c)

(a) 52 & 53 Vict. c. 67, s. 3. See per Brett, L.J., *Mogott v. Colvill*, 4 C. P. D. 238, *Bromet v. Moore*, [1904] 1 Ch. 305.

(b) W. L. R. 1907, r. 39 (1) (a), (b), (c). *Ante*, 738. (c) Sec. 8 (10).

EMPLOYMENT.

Chap. VII.

To bring an accident causing personal injury within the Act, it is not merely necessary that there should be an employment, but the accident must be one "arising out of and in the course of" it. These phrases have separate and distinct valuations. (a)

The employment covers all that class of acts which formed ordinarily or reasonably tall to be done by those engaged in the work assigned to the workman. The expressions "scope of authority" and "course of employment" are synonymous terms, and an act done in the carrying on of the business entrusted to the workman binds his employer, though it may be beyond any authority actually given to him. (b)

At the outset we may note that the *onus* lies on the *onus* applicant (c) to prove that the personal injury for which compensation is sought was caused by accident arising out of and in the course of the employment.

Collins, M.R., says in *Pontret v. James & Y. Ry.* ^{Collins, M.R., in Pontret v. James & Y. Ry. (d)} "In the present case, however, the only evidence upon which the learned judge acted, as explained by the principle upon which he acted, was that during the employment of the deceased he met with an accident. That seems to me to be the principle which he applied to the case, it being once shown or admitted that this occurrence was an accident, and that it took place during the employment of

(a) *Smith v. L. & A. Y. Ry. Co.*, [1891] 1 Q. B. 141. *Antony v. L. & A. Y. Ry. Co.*, [1902] 3 K. B. 148. and see *Bartholomew v. L. & A. Y. Ry. Co.*, [1908] 2 K. B. at 799.

(b) *Dunn v. Munday*, [1895] 1 Q. B. 712 at 718. Cf. *Wright v. Carter*, [1902] 1 K. B. 715. *Coachman's authority to place driver's credit for forage*. *Id.*, 138-139.

(c) Per Collins, L.J., *McNicholas v. Dawson & Son*, [1899] 1 Q. B. 773 at 775.

(d) [1903] 2 K. B. 718 at 721.

Chap VII. — the deceased, he seems to have thought that sufficient unless the employers gave evidence to the contrary; in other words, he must have held that it shifted the burden of proof, and threw on the employers the onus of showing that it did not arise out of the employment. In my opinion that is a wrong view. The burden, and the whole burden of proving the conditions essential to the obtaining an award of compensation, rests upon the applicant and upon nobody else, and if he leaves the case in doubt as to whether these conditions are fulfilled or not, where the known facts are equally consistent with their having been fulfilled or not fulfilled, he has not discharged the onus that is laid upon him" (a).

*Mitchell v
Glamorgan Coal
Co.*

In *Mitchell v Glamorgan Coal Co (b)* this is adopted by the Court of Appeal, with the addendum that if the known facts are equally consistent with either alternative, the plaintiff is not entitled to succeed, because no one could reasonably draw the inference in his favour, but one's knowledge of the affairs of ordinary life must be brought to bear to determine whether the known facts are equally consistent

*McDonald v
Owners of
s.s. Banana*

In this connection *McDonald v Owners of the s.s. Banana (c)* is an instructive case. Deceased was employed as a "donkeyman" in the s.s. *Panama*. When the ship was at Bremerhaven he went ashore. On returning he slipped off the gangway leading to the ship and fell into the water, striking his head as he fell; from which injury he died. The only evidence of how the accident happened was an extract from the ship's log-book. The Deputy County Court judge was of opinion

(a) By s. 8 (2) a modification of this rule is applied to cases under the section. *Ibid.*, 364.

(b) 23 T. L. R. 589. See *Good v Glasgow & S.W. R. Co.*, 45 Sc. L. R. 128: workman found killed while probably performing duty.

(c) [1904] 2 K. R. 926, 24 T. L. R. 887.

that a conclusion could be drawn from this consistent either Chap. VII. with the deceased having met his death by accident arising out of the employment or otherwise. In those circumstances, he thought that he was entitled to draw the inference that the deceased was returning to the ship, in pursuance of an obligation so to do, and that the accident occurred by reason of the risk naturally incident to his occupation, and arose out of and in consequence of his employment." The Court of Appeal upset his award in favour of the widow. "There seems to be no presumption in favour of one view rather than of another, and that is precisely the position that was dealt with by the House of Lords in *Wakelin v. L. & S.W. Ry. Co.* 12 App Cas 11." (a) "There being no such presumption as that suggested, the *onus* in the present case is upon the applicant to show that the accident arose out of, as well as in, the course of the employment of the deceased." "The accident," said Cozens-Hardy, M.R., (b) "in the present case did not happen on the ship, although the man was very close to the ship on his way back. I have stated three possible events. If he was sent ashore on a ship's errand, he would be within the Act. If he went ashore without leave he would plainly not be within the Act. If he went ashore, not on a ship's errand, but with leave and for his own pleasure, I think he would equally not be within the Act. To give an illustration which possibly appeals to most of us, if I send my domestic servant in the evening with a letter to a friend and he is knocked down by a motor omnibus on his way to or from my friend's house, I should be liable. If, however, he, having a night off, goes—as he is at full liberty to go—to the Franco-British Exhibition for his own amusement and meets with an accident at the same spot, I take it I should not be liable."

(a) *Per* Farwell, L.J., *l. c.* 930

(b) *L. c.* 929.

Chap VII.

Question of fact

Whether an accident is one "arising out of or in course of an employment" must be largely a question of fact. In ordinary cases it is obvious that an accident occurring *e.g.* when a workman is on the top of a tram or in a railway train, on his way to his work) is not more an accident in the course of his employment or arising out thereof than is one occurring while he is getting up in the morning or having his breakfast.

On the other hand where men left their work in a mine and were going off in a body for their own purposes to make a complaint to the manager when an accident happened by which one of them was injured, the House of Lords decided that the employer who let the men down into the mine was bound to bring them up, even if they leave their work and wish to come up for their own business (a).

Again, where the terms of the employment are that the workmen are to travel up and down a railway line for the purposes of their work, any accident which happens to them in their transit is clearly in the course of their employment. (b)

Principle.

The principle is well stated by Mr. Labatt (c) though dealing with a different aspect of the subject, so that some adjustment of his language must be made. "It is clear that the defence of common employment is not available to

(a) *Byden v. St. John* (2 Macq. (H. L. Sc.) 31).

(b) *Timney v. Midland Ry. Co.* (1 L. R. (C. P.) 29). The same point was decided in the *Metropolitan v. Gathorne-Smith* (Broad Ry. Corporation, 161 Mass. 228) (1 p. 161). *Metropolitan Ry. Co. v. T. L. R. 2*, and the *South Lancashire v. Metcalfe* (1 L. R. 10). For the facts of this last case, see *supra*, 203. The judgment of Justice Oliver in *Holmes v. Mackay*, 106 L. T. newspaper 118, contains a full discussion of the law in this connection. *Valley v. L. F. Ry. Co.* (1 L. R. 56), is an unusual case. The death was caused while going to the employment in a way that was forbidden. With *met. Bank, Ltd. v. Navigation Co.* (191 L. R. 490), is a case where it was a term of the contract that miners should be down in the mine by 7 a.m. See Labatt, *loc. cit.* 1833. The point was made in *Coldrick v. Portridge, Jones & Co., Ltd.* (21 L. R. 616), but was not decided, 619.

(c) *Master and Servant*, 1892.

the master where the injured person was travelling entirely for his own purpose, and the right of the master to exact the performance of service was not merely dormant, but wholly superseded." Chap. VII.

If an accident arises out of the employment, the workman is entitled to compensation under the Act, even although it is due to the misconduct of a stranger. This right conferred upon the workman is regulated by sec. 6, (a)

There is no such right where the stranger has taken the workman off the occasion of the workman being engaged in the employer's work to injure him by a wilful act, since, though the time at which the injury happens would be while the workman is engaged in the employment, the injury would neither arise out of nor be in the course of the employment. (b)

In *Smith & Lanes & Y. Ry. Co.* (c) the Court of Appeal held that to bring a case within the Act "it is necessary to show an employment to which the Act applies, and also that the accident which caused the injury was one arising out of and in the course of such employment." The facts showed that a man employed to collect tickets having finished collecting them from the passengers by a train, after the train had started got on the footboard to speak to a woman passenger in a carriage, not for any object of his employers, but for his own pleasure; in doing so he caught his foot and was killed. The accident was held not

Not arising out of employment.

(a) L. J. 305.

(b) Cf. *Lea & Parsons v. Burchard*, 11 Ch. D. 68. The decision under the Bankruptcy Act, 1861, (L. J. 100), on the words "debts due to the bankrupt on the contract of trade," and thus only very indirectly bearing on the point noticed in the text.

(c) 1899 1 Q. B. 111 at 113. *Smith, Lanes & Y. Ry. Co.* commented on and explained in *McNichol v. Dawson & Son*, 1899 1 Q. B. 773. With these cf. *Dunlop v. Power Bros. & Co.*, 36 Sc. L. R. 190, and *Callaghan v. Maxwell*, 37 Sc. L. R. 310. *Fulleton, Hodgkin & Barclay v. Leque*, 38 Sc. L. R. 738, J. F. 1006, *Road v. G. W. Ry. Co.* in H. of L., 25 T. L. R. 36.

Chap. VII. to arise out of the employment, and the defendants consequently were not entitled to recover under the Act.

*Goodlet v.
Caledonian Ry.
Co.*

The Scotch case of *Goodlet v. Caledonian Ry. Co.* (a) illustrates most clearly the principle at the bottom of Smith's case. An engine-driver having brought his train into the station about 10.10 p.m., was ordered to take his engine into a particular "lye" there. Having done so, he crossed some four or five sets of rails to ask why he had been ordered to put his engine in the particular "lye," which was an unusual one, and thinking there might be some mistake. His next duty was to take out a train at 11 p.m. After inquiring about his engine, he crossed two more sets of rails to a spot about twelve or thirteen yards further off from his engine to speak to B., another employé in the Company's service. What he had to say to B. was merely casual conversation, lasting for a moment or two, and had nothing to do with his duties as an engine-driver. Immediately after leaving B., and while he was on his way back to his engine, he was knocked down by an empty train, which was being shunted. The Court of Session held that the accident arose out of and in the course of the employment. The Lord Justice-Clerk distinguished Smith's case: "There the ticket collector " was not, at the time, acting in the employment of his master, and, moreover, was exposing himself to danger which was palpable to him."

Lowe v. Pearson

The Court of Appeal in *Lowe v. Pearson* (b) held the following facts not to bring the accident arising therefrom within the words "out of and in the course of the employment." A boy was employed in manual labour in pottery works. His duty was to make clay balls and hand them to

(a) (1902) 1 F. 986. (1 p. 1140) on *re Whitaker Bros., Ltd.*, 16 T. L. R. 108; *Hendry v. Caledonian Ry. Co.*, (1907) 8 G. 732, where *Goodlet's* case was distinguished.

(b) [1899] 1 Q. B. 261.

a woman who worked at a machine. The boy had nothing to do with the machine, and was expressly forbidden to interfere with it. The woman, being in want of clay, went for some. In her absence the boy attempted to clean the cones of the machine. His fingers were caught in the machine, and he suffered injury. A. L. Smith, L.J., based his judgment on the facts that the boy was ordered not to touch the machine, that he knew he was not to touch it, and that "he was solely employed in manual labour in making clay balls and had nothing to do with the machinery at all."

The County Court judge had held that the boy knew it was against orders for him to clean the cones, and that he went about its cleaning in a careless and reckless manner, yet that his action was prompted by a desire to further the work, and that his conduct did not amount to serious and wilful misconduct. A. L. Smith, L.J., remarks as to this: "The County Court judge has found that the respondent was not guilty of 'serious and wilful misconduct,' because he did what he did with a view of furthering the work; but it does not appear to me that the finding is of any importance as bearing on the first question whether the accident arose out of and in the course of the respondent's employment."

Lowe v. Pearson was fruitlessly prayed in and in *Whitehead v. Reader* (a) and was much discussed there. A workman was employed as a carpenter, and part of his duty was to sharpen his tools on a grindstone rotated by machinery. He had had orders not to touch the machinery; but the driving band having slipped, he endeavoured to

(a) 1901, 2 K. B. 48. *Smith v. South Norwiche Colliery Co.*, [1908] 1 K. B. 201, one of the numerous cases where the County Court judge's finding was upheld because "there was evidence upon which he was entitled to find as he did."

Chap VII. replace it and was injured. The man's act was held not necessarily outside the employment and disentitling him to recover. The principal value of the case is from expressions in the judgments. "It cannot be said that every disobedience of an order terminates a man's employment. Disobedience may or may not give a defence to a master under the clause relating to serious and wilful misconduct" ^(a) "It cannot be said that every disobedience of an order terminates a man's employment so as to exonerate the master from the consequences of the breach of his orders. We have to get back to the orders emanating from the master to see what is the sphere of employment of the workman, and it must be competent to the master to limit that sphere. If the servant acting within the sphere of his employment violates the order of his master, the latter is responsible. It is, however, obvious that a workman cannot travel out of the sphere of his employment without the order of his employer to do so; and if he does travel out of the sphere of his employment without such an order, his acts do not make the master liable."

In the Nunnton County Court, in the case of *Matthews v. Belworth Brick, Tile and Timber Co., Ltd.*, ^(b) Judge Wightman Wood held the applicant entitled to compensation where her husband had been killed when descending a shaft to rescue a fellow-workman who had been overpowered by choke-damp, "because, although he [the deceased workman] was not acting under any direct order to do what he did, he was acting under a reasonable belief that his employers would have wished him to do what he did" This ground of decision seems within the principle enunciated

^(a) *Per Smith, M.R.* at 50.

^(b) 106 *Law Times* newspaper, 435.

in *Lowe v. Pearson*,^(a) and reiterated in *Bees v. Thomas*,^(b) Chap VII

"of a servant, while in his master's employ, doing upon an emergency something outside the scope of what he was employed to do in the interests of his master." The learned County Court judge thus puts his point. "If [the act which cost the deceased his life] was done not only for the benefit of the man for whom he went down, but also for the benefit of his employers, who would certainly have sustained considerable pecuniary loss if the man who fell first had been allowed to be there and had lost his life." This view assumed a not unimportant point as to what is "serious and wilful misconduct." The man who fell first was warned by the superintendent not to descend the shaft "without first testing the air." The man replied, "Old man, we know our business," and descended wilfully and recklessly.^(c) But under the Act of 1906 the assumption is irrelevant; and, though the process of the reasoning is grotesque, the conclusion in carefully chosen instances is sound.^(d)

Neither is there any right to compensation on the part of the workman under the Act when the injury is done by an accident in some adjacent premises to those in which he is working and the consequences of which extend to the employment in which he is working, as they might have extended to him had he been elsewhere and have had merely an accidental connection with the business, for the personal injury does not arise out of the employment in the sense of the Act. Because the injury results during the employment it can undoubtedly be said that the accident occurs "in the course of the employment"; it may also, in a sense,

(a) [1899] 1 Q. B. 261.

(b) [1899] 1 Q. B. 605.

(c) Cf. *Semor v. Ward*, 1 E. & B. 385.

(d) *Idole*, 91. *London and Edinburgh Shipping Co. v. Brown*, 7 F. 488. *Post*, 386, and *Mullen v. Stewart*, 45 Sc. L. R. 729, and *post*, 388 & *seqq.*

Chap. VII. be true that the accident arises out of it, in so far as the workman is engaged in proximity to the agency that causes the accident, but this is not enough; the accident must be caused by operations within the scope of the employment and not by others with which the employer has no concern. (a) An injury, for instance, caused by men larking, or by independent trespassers, or by one workman with a grudge against another, would not be within the Act. The case of a workman injured by machine breakers or strikers would seem different. So would that of a steedle jack blown down by a high wind. "The statute does not provide an insurance for the workman against every accident happening to him, while he is engaged in the employment of his master, but only against accident arising out of and in the course of that employment." (b)

*McIntyre v
A. Rodger.*

The other side of this principle is seen in *McIntyre v. A. Rodger*. (c) Applicant was oiling his machine with a brush not belonging to the machine he was at but to that of another workman, who came up and demanded the brush, which he pulled from the applicant's hand, and in so doing injured applicant. The applicant was held entitled to compensation in respect of an injury arising out of and in the course of his employment. An engine driver injured by a stone intentionally dropped by a boy from a bridge over the line was held to be injured by an accident "arising out of" the engine driver's employment. (d) "I should," says *Clemons-Hardy, L.J.*, (e) "hesitate to say that an accident due to stone throwing by a stranger would in the case of every employment come

(a) *Falcover v. London and Glasgow Engine Co., Ltd.*, 3 F. 564, followed *Armitage v. Lancs. & Y. Ry. Co.*, [1902] 2 K. B. 178, which was followed in *Wm. Baird & Co., Ltd. v. Burley, Leese, L. R.* 116, a case of larking, and was followed and approved by the *C. of A. v. Fitzgerald v. W. G. Clarke & Son*, [1908] 2 K. B. 710.

(b) *Per Collins, M.R.*, *Armitage v. L. & Y. Ry.*, [1902] 2 K. B. at 181.

(c) 6 F. 176.

(d) *Challis v. L. & S.-W. Ry. Co.*, [1905] 2 K. B. 151. (e) *L. c.* 159.

within the Act. I am not, however, prepared in this case . . . Chap. VII.
to disregard what is common knowledge, namely, that the
offence of throwing stones at traps to a bridges and other
places by boys is of frequent occurrence. It seems to me
that the risk of such an occurrence is one which may
reasonably be looked upon as incidental to the employment
of an engine driver, though it might not be incidental to
other employments."

The same view was taken in *Andrew v. Paulworth* Andrew v. Paulworth Industrial Society (1). The workman there was injured by
lightning while "working on a scaffolding at a height
of about twenty-three feet from the ground on a building
which his employers were engaged in erecting." Evidence
was given that this was "a very exposed position." "If
it is wet the danger is increased." "A man working on an
elevated scaffold runs an appreciably greater risk from that
fact." *Ex p. M. R.*, thus states the principle applicable.
"Though it may not be connected with, or have any
relation to the work the man was doing, yet, it in point
of fact the position in which the man was doing the work
and the place he must necessarily occupy whilst doing the
work are a position and a place of danger which caused
the accident, it may fairly be said that it arose out of
the employment, not because of the work, but because
of the position"; and this modification must be taken as
involved in the statement of the general principle. (b)

A night watchman injured by the fall of a shanty
(wherein, because of the rain, he had lighted a fire to cook
a chop) is injured in or about his employment though he
ought not to have lighted a fire there at all. (c)

(a) [1901] 2 K. B. 32.

(b) *Ante*, 377.

(c) *Morris v. Mayor, etc., of Lambeth*, 22 T. L. R. 22.

Chap. VII. A case where the facts are like they were in *Smith v. Baker* (a) would undoubtedly fall within the Act; but that would be by virtue of the danger causing the accident being within the employment. The case of *Johnson v. Lindsay* (b) would also appear to be a case provided for. There a condition of the working is that it is carried on in conjunction with the workmen of other employers, so too in *Woodley v. Metropolitan Ry. Co* (c). The provisions made by the Act for injuries inflicted by outsiders (d) must be such as arise "out of and in the course of the employment."

Effect of sec 6

The effect of sec. 6 is very difficult to define, but it does not extend to cases where injury has arisen from negligence in the exercise of rights of property by adjacent owners, and will not be extended beyond such acts as would *ab initio* have been regarded, by a reasonable man whose attention was turned to the matter, as incidents likely to be attendant on the conduct of the work for which he engages himself. There must be personal injury arising out of or in the course of the employment, which alone is "injury for which compensation is payable under this Act."

Injuries sustained while going to work.

As an abstract proposition it is not correct to say that injuries sustained by a man while going to his employment arise out of his employment, or on, in or about the railway, factory or other locality wherein he exercises his employment. (e) To include these there should be circumstances to the contract which bring in things happening before the hour at which the work is to commence, and not on the site of the work. Thus, if workmen have an option whether they use a tram belonging to the employer from their work to their homes, and one of them, using the

(a) [1891] A. C. 325.

(b) [1891] A. C. 371.

(c) 2 Ex. D. 384.

(d) S. 6. *Ante*, 308.

(e) *Holmes v. Mackay & Davies*, [1899] 2 Q. B. 319.

means of conveyance offered, is injured thereby, his accident has been held not to be one arising out of and in the course of the employment. He went home by a way he was not bound to take, and was under no duty to his employers at the time of the accident; and in no sense could the accident be said to have been connected with his employment.^(a) It is, however, otherwise where the conveyance is a term of the contract of employment, as it was held to be in *Holmes v. Great Northern Ry. Co.*^(b) An engine cleaner who was engaged at King's Cross was directed to work at Hornsey, whither he travelled by train; then he proceeded to cross the line to get to the engine shed where he worked, but was killed by an express train. The contention of the employers was that the injury did not arise in the employment, and reliance was placed on *Holness v. Mackay & Davies*^(c) to show that the employment did not commence till the hour of actual work had arrived, that is, to wit, while it was admitted that the train reached Hornsey at 5.15 a.m. The County Court judge took the view that the accident happened while the workman was going to the particular place on his employers' premises where he had to work, and that the beginning of the employment was at King's Cross. This view commended itself to the Court of Appeal.

If it be found as it was in the case just cited, ^(d) that it was no part of the contract of employment that the employment should include the time taken in getting to and from work, and that the employers had performed their duty when they obtained a licence to their workman to go

(a) *Davies v. Rhymney Iron Co., Ltd.*, 15 T. L. R. 329; *Caton v. Summerlee and Mossend Iron and Steel Co., Ltd.*, 1 F. 989.

(b) [1900] 2 Q. B. 109.

(c) [1899] 2 Q. B. 319.

(d) *Holness v. Mackay & Davies*, *supra*.

Chap. VII. over the railway company's premises, the zone of danger in that case, there is no obligation to take measures for their safety in traversing it. This was under the Act of 1897. Under the Act of 1906 the limitation "on in or about" premises is abolished, there is no restriction now as to the place. The only consideration is whether the accident arises "out of and in the course of the employment"; and on the assumption there made the case still remains an authority.

*Cremles v.
Bues, Keen, &
Nettlefolds*

This brings us to the earliest case under the Act of 1906, *Cremles v. Ginst, Keen, & Nettlefolds, Ltd.*, (a) where colliers who resided six miles from their work were conveyed to and from their work "free of charge," and "as an implied term of the contract of service." A workman who was injured while on the platform waiting for the train was held injured in the course of his employment. "To avoid misconception," says Cozens-Hardy, M.R., "I desire to say that I base my judgment on the implied term of the contract of service, and that it by no means follows that every workman is entitled to the protection of the Act whenever an accident happens to him on his way from his home to his employers' place of business."

*Sharp v.
Johnson & Co*

The distinction is that indicated above: if the master has control there is responsibility, if not there is none. This is illustrated by what Collins, M.R., says in *Sharp v. Johnson & Co* (b): "It clearly appears to have been decided both in this Court and the House of Lords in *Cress, Tritley & Co. v. Catterall* (c), that the moment at which the actual work of the workman begins cannot be taken as the true moment of the commencement of his employment for the purposes of the Act. Lord Halsbury, C., appears

(a) [1908] 1 K. B. 469.

(b) [1905] 2 K. B. 139 at 145.

(c) Not reported.

to have said in that case that it was not correct to say that the employment of a miner did not begin till he struck coal with his pick, and that the workman here was doing something on behalf of his employers, as being essential to the work which he was employed to do when going to the lump-eaten to get his lump. It was there held that the employment commenced as soon as the workman crossed the boundary line of the employers' premises, though he had to do something after getting over that boundary before he could commence actual work. So the moment of beginning the actual work is not the true test of the time when the employment commences."

Chap. VII

In *Benson v. James & Y. Ry. Co.* (a) a workman went to a signal box in the midst of the permanent way, not for his employers' business, but to make an inquiry on his own account, and while returning was injured. The accident was held not to arise out of or in the course of the employment.

Benson v. James & Y. Ry. Co.

In *Sharp v. Johnson & Co.* (b), the workman was injured while depositing a check ticket before beginning work, and the accident was held to arise out of the employment. (c) The distinction is between the man pleasing himself and advancing his employers' business. *Haley v. United Collieries* (d) is a case where both considerations were present. There had been a breakdown at the pit where the applicant had been working. The applicant went to inquire when work would be resumed, and to draw his advance wages. He was held not entitled to recover because he was injured while leaving the mine by a short cut and not by the "provided exit." As Lord Pearson put the point (e): "The crossing the lye where the accident took place was no more in the course of his employment than if, in making

Sharp v. Johnson & Co.

Haley v. United Collieries

(a) [1901] 1 K. B. 212. (b) [1905] 2 K. B. 130. (c) [1905] 2 K. B. 139.
(d) [1907] 8 C. 317, *Reed v. G. W. Ry. Co.* in 11 of L., 25 T. L. R. 36.
(e) *L.C.* 217

Chap. VII. his exit, he had crossed his employers' wall by climbing or their caual by swimming"

Lowry v. Sheffield Coal Co

In *Lowry v. Sheffield Coal Co* an injury received while going to the pay office to receive wages due was held to be one arising out of and "in the course of the employment." Cozens-Hardy, M.R., thought "it was just as much part of his (the injured workman's) employment to go to the pay office . . . as it was to go down to the pit on the following Sunday night"

Workman trespasser

A variation of the circumstances is provided where the workman, in order more speedily to get to his work, trespassed on other premises and was injured. His work was to paper the ceiling of a church. On his arrival he found the door locked. To gain access he climbed the iron railings of a neighbouring school yard. A spike pierced his foot, and from the effects of the wound he died. The Lord Justice Clerk puts the point tersely: "He had not reached the 'factory' and was taking his own way of coming to it; the accident could not therefore arise out of and in the course of his employment." Lord Macnaghten doubted; yet it seems reasonably plain that the injury was not received in the course of the employment. (*b*)

Duty to report before leaving work.

Equally plain is the case of the engine driver, part of whose duty was to report himself before leaving work, and who was injured whilst doing so. The accident was in the course of the employment. (*c*)

It has further been held that a miner's employment has commenced when he has obtained his pit lamp and his "tallies," and is waiting at the pit brow to descend. (*d*)

(a) 24 T. L. R. 142

(b) *Gibson v. Wilson*, 3 F. 661.

(c) *Tod v. Caledonian Ry. Co* (1899), 1 F. 1047, approved *Mackenzie v. Coltness Iron Co.*, 6 F. 8

(d) *Fitzpatrick v. Hindley Field Colliery Co.*, *Law Times* newspaper, 18th April, 1901, 8 W. C. C. 37, affirmed in C. of A., 4 W. C. C. 7.

A benignant view of the facts originally secured for the widow her compensation in *Douglas v. United Mineral Mining Co., Ltd* (a). A collier having a mine induced a boy by a trick to wind him up by a shaft used only for pulling up tools, but dangerous for men. The boy had refused to wind him up, saying he should only wind up the tools. "Go on, then," said the man. The boy, thinking he was winding the tools, began to wind. When near the top the man called out "Higher up." The boy was startled, let go, and hence the accident. The Court of Appeal agreed with the County Court judge that the accident arose out of and in the course of the employment. They were of opinion that there was evidence for the finding of the judge on the question of "serious and wilful misconduct," which they therefore could not disturb. Collins, L.J., observed that he "would not have interfered if the County Court judge had found the other way." The evidence was that men frequently left the mine in this manner, though never when an overman was present. The practice was known to be prohibited, but no actual notice was posted forbidding the use of the shaft to men. *ib.*

Chap VII.

Douglas v.
United Mineral
Mining Co.

An accident may readily be attributable to the negligence or fault of the injured, and none the less on that score arise out of and in the course of the employment. This is clear from the provisions as to serious and wilful misconduct (c). That work is done in a wrong way conveys no valid suggestion that the workman was not engaged in his proper employment, not even if the way is a dangerous one,

Negligence
irrelevant,
Darham v.
Brown

(a) Times newspaper, 20th Feb., 1900, 2 W. C. C. 15.

(b) Cf. the Scotch case of *Logue v. Fotherton*, 1 F. 1006. The decision turned on the absence of a finding that the workman's attention had been called to a rule forbidding the use of a hoist.

(c) S. 1, sub-s. 2 (c). *Ante*, 300. *Post*, 394.

Chap. VII. provided the danger encountered falls short of inferring serious and wilful misconduct. (a)

Lowe v Pearson and Whitehead
Reader distinguished,

This principle came in conflict with the principle asserted in *Lowe v Pearson* (b) in *Whitehead v Reader*. (c) A carpenter when requisite sharpened his tools on a grindstone, rotated by machinery. He was forbidden to touch the machinery, but the hand rotating the grindstone having come off he endeavoured to replace it, and injured his hand. The County Court judge found that the accident arose out of and in the course of the employment of the workman, and that *Lowe v Pearson* did not apply. There a boy was injured who had been told not to touch a certain machine. In doing so he acted outside the scope of his employment. In the present case the workman was at his proper business. On an emergency instantly arising and on the impulse of the moment he interfered with the machinery. This was neither outside his employment nor yet wilful and serious misconduct. (d)

but followed in
Losh v Richard Evans & Co

Lowe v Pearson was followed in *Losh v Richard Evans & Co*. (e) Applicant was a girl of eighteen, whose duty it was to pick dirt out of coal as it passed along a band. The man in charge of the engine being temporarily absent, the girl started the engine, which some of the girls who were

(a) *Bootham v Brown*, 113 250 per Lord Kinnear. "It does not seem to be reasonable that a man ceases to be in the course of his employment because he takes a wrong or dangerous method of doing what might be done safely, if it was to be done at all."

(b) [1897] 1 Q. B. 260. 141, 171.

(c) [1901] 2 K. B. 48. (q. Rev.) 1 Kyrouh 1, 61. 18 T. L. R. 11, where the injured boy "acted on a sudden impulse in pulling up an iron nut screw which had fallen from its place and was injured by a circular saw." The "element of willfulness did not enter at all into what he did"; so he was entitled to recover.

(d) 1 p. *Guthrie v Boase Spinning Co.*, 98 Sc. L. R. 143, where "serious and wilful misconduct" was found.

(e) 19 T. L. R. 142, *Goshall v James Gillies & Co.*, [1907] S. C. 68, where Lord Kinnear says at 72, "It seems a narrow understanding of the contract of employment to say that he [the injured man] went beyond his duty in giving a helpful hand to others."

working with her told her not to touch, though others of them at times stopped and started the engine. The County Court judge found as a fact that it was not her business to touch the engine. The Court of Appeal held that there was evidence to question this finding, but Mathew L.J., dissented on the ground that there was no express prohibition to the injured girl against doing the act that caused the injury, and, moreover, that it was customary for the girls to do so in the absence of the man in charge. The question whether and how far one sphere was marked off from another is a question of fact.

In *Smith v. Normanton Colliery Co.* (a) a boy was suspended from work and told to go to the bottom of the pit. He did not do so, but remained in a "pass by," where two hours later he was injured. The County Court judge held that the accident did not arise in the course of the employment. The Court of Appeal held that there was evidence from which he might so find, but "it appears to me (b) to be a question of fact where the line is to be drawn, but there must be some line beyond which the liability of the employer cannot continue." The boy was "where *prima facie* he had no business to be." Yet where a workman remained on the premises during the dinner hour and ate his dinner under a wall which he had been building, and while so engaged the wall fell upon him, the accident was held by the Court of Appeal to have arisen in the course of the employment (c) "We must take a broader view, and treat him as continuing in the employment of the master by the consent of the master, inasmuch as it is for the master's advantage that the workman should have an opportunity to feed himself. A workman would do his work all the better by taking his

Smith v. Normanton Colliery Co.

Blount v. Sawyer.

(a) [1903] 1 K. B. 201, 73 L. J. K. B. 76

(b) Collins, M.R., at 207

(c) *Blount v. Sawyer*, [1904] 1 K. B. 271.

Chap. VII. men at that time, and if it is part of the contract between him and his master that he may do so upon the works instead of going away, that may be a matter of mutual convenience." This somewhat "refined reasoning" dwindles away thus: "It does not seem . . . that as a matter of law it can be said that, when sitting down to his dinner, the applicant had ceased to be in his master's employment." The Scotch cases follow the same lines, and so do the Irish. (a) Thus, in *Keenan v. Flemington Coal Co.*, (b) a miner went to the boilers to get a drink of water. In returning he was struck by a runaway hatch and killed. The accident arose out of and in the course of his employment. In *Powell v. Lanarkshire Steel Co.* again, it was assumed that a halt-an-horn's rest that was allowed a boy between two jobs was not a break in his employment.

Scotch and Irish
cases

Mullen v.
Stewart & Co.

Mullen v. Stewart & Co. (c) is the case of a workman who along with others broke off work (rightly) and went to a public-house to refresh. As they returned to work they saw a bogie being drawn from one portion of the works to another, and one of them in a spirit of mischief took hold of the rope at a point between the bogie and the men who were drawing it, and proceeded to pull against them. While doing so he slipped and fell across the rope and was in imminent danger of being crushed had not another run to his assistance, but was himself crushed in rescuing the other man. His intervention was held not to be in course of his employment, nor did the accident arise out of or in the course of the employment. (c)

(a) *McAdam v. Harvey*, [1903] 2 I. R. 511

(b) 5 F. 161.

(c) 6 F. 1039.

(d) 45 Sc. L. R. 729. *Ibid.*, 376.

(e) See also *McAllan v. Parthasar County Council*, 8 F. 783 workman's private arrangement.

The signification of the phrase "course of the employment" was considerably extended in *Brown v. Scott*,¹ where the Court of Appeal (Wilham, L.J., dissenting) held that a boy who was injured by a machine which he was told to oil by a man who was not in authority over him was acting in the course of the employment in obeying the order. True, the boy was deceived; for on asking: "Who says so?" the reply was, "Your boss," indicating the foreman. The boy then objected to oil the machine while in motion. The man refused to stop the machine, and threatened to report the boy. The boy thereupon complied, and was injured. As the precise circumstances are hardly likely to recur the decision is not to be regretted.

Action on an emergency does not disentitle the workman so acting to recover. Thus, a miner carrying a report of the state of the mine from the pit's mouth to the office was riding on a truck when the horse bolted. The miner jumped down, tried to stop the horse, but slipped, fell and was killed. The miner's action in the interest of his master in an emergency which suddenly arose was held by the Court of Appeal to be in the course of the employment, and arising out of it.² "The deceased was acting in the interest of his master in an emergency which suddenly arose, and in which any one would, I should think, have tried to do the same thing."³ (c)

(a) 1 W. C. C. 11. See, however, *Edwards v. The International Coal Co., Ltd.*, Times newspaper, 23d November, 1891. The Scotch Case, *McQuibban v. Macraes*, 2 F. 732, is a similar decision only "stronger," the injured person being an adult. "The legislature used language of wider scope to include cases where a workman interferes to do something useful or helpful to his master, although outside the special duties which he is employed to perform."

(b) *Rees v. Thomas*, [1891] 1 Q. B. 1015. Cf. *Devine v. Caledonian Ry. Co.*, 1 F. 1105. A carrier killed while endeavouring to stop his runaway horse.

(c) Per A. L. Smith, L.J., *l. c.* at 1017.

Chap. VII.

Actual working
not necessary
Harrison v.
Whitaker

The "course of the employment" does not necessitate any work being done at all at the time of the accident. Thus in *Harrison v. Whitaker Brothers*,^(a) the injured boy was "resting" at the time of the accident. His duty was to grease the wheels and axles of railway trucks. He finished greasing all that were ready for him, and while waiting for more he went to a fire a short distance from his post and sat on the handle of a lever near by to warm himself. An engine with trucks coming down the line jerked the lever and threw and injured the boy. His injury was one "arising out of and in the course of the employment," for "it was the boy's duty to wait for the other trucks."

Cause of accident
external to the
employment

The distinction between an accident in the course of the employment but not arising out of it, was emphasized in the Scotch case of *Fulmer v. London and Glasgow Engineering and Iron Shipbuilding Co. Ltd.*^(b) Respondent was employed as a blacksmith in the appellants' works, and was at his work when he was injured by two of his fellow workmen tumbling over him in their horseplay. The Court held, Lord Moncreiff dissenting, that the accident did not arise out of, though it was received in the course of, the employment. The object of the statute was to compensate workmen who were engaged in occupations which exposed the *employés* to exceptional dangers. The protection, was, however, against accidents incidental to the special employments.

Lord Trayner's
illustrations.

Lord Trayner's judgment is fruitful in illustrations. A servant engaged in a foundry, if struck by lightning, could have no claim under the Act, nor yet his representatives, if he were killed. A workman at his work injured by a stone thrown maliciously over the wall of the yard, or by a pistol fired into the yard by an outsider, could not successfully

(a) 16 T. L. R. 108.

(b) 3 F. 564.

rely on the Act. Such accidents, though received in the course of, in no sense arise out of the employment, and might equally happen to workmen engaged in employments which are not within the employments enumerated in the Act: (This was said under the Act of 1897.) This line of reasoning on the whole seems satisfactory, and was followed by the Court of Appeal in *Vincent v. James and Y. Ry. Co., Ltd.* where two boys quarrelling, one threw a piece of iron at the other which struck and injured a third, who was engaged at his work. The accident was due to a "wrongful act which had no connection with the employment." "An useful guide" in such a case was "to see whether the act which caused the accident was or was not entirely outside the scope of the employment of the person who committed it." The legislature did not intend "to give compensation to the workman for injuries occasioned to him while engaged in his employment, by an accident arising from any act which might be done by another workman engaged in the same employment, although it might have no relation whatever to that employment."

Rowland v. Wright (a) is interesting not from any new view of the law, but from the novelty of the facts. A teamman took his horses home for the midday meal to the stables, where was a cat, which, so it was said, without provocation or any manifest inducement, bit the teamman, and in consequence he had to have two fingers amputated. The injury was sustained arising out of and in the course of his employment.

The period for which a workman must be disabled before he can claim under the Act is at least one week; during which time he is prevented earning full wages, (c)

(a) 2 K. B. 178.

(b) 21 T. L. R. 852.

(c) S. 1, sub-s. 2 (a). *Ante*, 299.

Chap. VII According to the usual computation the week must be reckoned excluding both the day of the act and that of the event (*a*) it usually means any consecutive seven days. (*b*)

"Full wages" and "Average weekly earnings."

There appears to be a distinction between the "full wages," disability to earn which entitles a workman to compensation, under sec. 1 (2) (a), and the "average weekly earnings" with reference to which his compensation is adjusted under First Schedule, sec. 1 (b).

The first sum is the full wages at the work at which the workman was employed immediately preceding the accident.

The second sum is "the average weekly earnings during the previous twelve months." (*c*)

The "average weekly earnings during the previous twelve months" is the actual average, not the possible average. A miner may choose to work only four or five days a week, or to take a rest for a whole week. In taking the average of his "earnings during the previous twelve months" he is not entitled to count in respect of those intermissions. His weekly average is 1/52nd of his total actual earnings in his employment for the whole twelve months --and on this his compensation is to be assessed. (*d*)

The fact that the workman has been paid "full wages" is only an element in the case. The test is whether he is disabled "from earning full wages." Suppose the rule of

(a) *The Queen v. Justices of Sloop-hire*, 8 A. & B. 174.

(b) *Bazalgette v. Trowe*, 31 L. J. Ch. 368, 436. *In re Railway Sleepers Supply Co.*, 29 Ch. 11, 204.

(c) First Schedule (1) (b), *ante*, 326. The statement in the text deals only with total or partial incapacity --not with death. In case of death, where dependants are left, there is a minimum payment of £150, or where dependants in part dependent are left an amount "reasonable and proportionate to the injury to the said dependants." First Schedule (1) (a) (ii). *Ante*, 326. *Post*, 521, as to weekly earnings, &c.

(d) *Keast v. Barrow Hematite Steel Co.*, 15 T. L. R. 141, *Williams v. Poulson*, T. L. R. 42.

an employment to be that injured men are kept on at their old rate of pay, a man injured is still entitled to compensation under the Act, for he might wish to leave his employment and go elsewhere where he could not command "full wages at the work at which he was employed," or he might be dismissed, at least he would be in *misericordia*. But we shall consider this aspect of the case more in detail, later on. *a)*

Chap. VII.

The Court of Appeal have decided that open and notorious "tips" sanctioned by the employer are to be brought into account in estimating the average "weekly earnings."

*Expt.
Penn v. Spiera &
Paul.*

This was disputed in the County Court and was given adversely to the workman because "weekly earnings mean earnings between employer and employé, and nobody else", and secondly there was no evidence of a bargain that the workman should retain the tips. In the Court of Appeal, however, it was pointed out that the measure of the compensation under the Act is not wages but earnings; and these must be in the employment. "If the workman by the exercise of his talents during his leisure hours, as, say, a conjurer or a musician, gains money, the money thus gained will increase his 'income' but not his 'earnings' under the Act." Earnings in the employment do not always come from the employer. As to the second point, it is enough that the Court finds that it is "an implied term for the contract, and that both parties contracted on that footing." "To avoid misconception," the Court added "that nothing in this judgment extends to 'tips' or gratuities (a) which are illicit; (b) which involve or encourage a neglect or breach of duty on the part of the recipient by his employer; or (c) which are casual and sporadic, and

(a) *Post*, 521.

B.E.L.

Chap. VII trivial in amount " When the fact that the Act of 1906 applies to "domestic servants" is considered, the possibilities opened up by the exception (d) are wide reaching. Will evidence be admitted to show that the gratuities to the housemaid are "casual," "sporadic," or trivial in amount; and will she be allowed to rebut this evidence by showing that her employer is given to hospitality, and that his guests are known in her walk in life for their liberality? (c)

"SERIOUS AND WILFUL MISCONDUCT"

Benefit
validity of the
legislation

We have already noted that if the action of the workman results in "death or serious and permanent disablement," though he may have brought it on himself by his serious and wilful misconduct, it is the employer or the insurance company who is to be permanently affected thereby. If the ruin done is great but the workman escapes, he loses any compensation. If the same ruin is done, but the workman is permanently disabled, then to the employer's ruin is added the burthen of a life pension for the man that worked it. The workman's compensation is in inverse ratio to the success he has in taking care of himself. Suicide, however, is not within the proviso, for the accident must arise out of and in the course of the employment.

For the moment we will defer the consideration of what "serious misconduct" is. The word connotes weight or gravity, and is thus very considerably dependent on its surroundings for its valuation. In the first instance, we may better direct our efforts to obtaining some definite notion of the legal import of "wilful misconduct." We may further note that the effect of these words is to exclude the defence of contributory negligence falling short of "serious and wilful misconduct."

(c) *Penn v. Spiers & Pond*, [1906] 1 K. B. 1908.

The word "wilful" in law amounts to nothing more Chap. VII.
than this—that he (the person whose act is so described) —
knows what he is doing, and intends to do what he is doing, ^{Meaning of} "wilful" in law,
and is a free agent (c)

"Wilful misconduct" is a phrase that has several times ^{Wilful} received judicial exposition ^{misconduct.}

In *Flemster v. G. W. Ry. Co.*, (b) Quinn, J., says, (c) ^{Quinn, J.} "Everybody knows how difficult it is to define the negligence which amounts to 'wilful misconduct' so as to justify a conviction for manslaughter. Something of the same kind is intended here—but without defining it exactly, it is sufficient that the facts here show no culpable negligence at all, and negligence must be culpable to constitute 'wilful misconduct'." The negligence in the case before the Court was taking cattle from their trucks and driving them into a yard from which they strayed upon the railway. Had the cattle been left in the trucks they would have had to remain there till the following day. Blackburn, J., ^{Blackburn, J.} said (d) "It is admitted that there was no malice in what the servants did here, and I fully agree that there may be many cases of 'wilful misconduct' without malice; for instance, if railway servants were to shunt trucks of cattle into a siding and leave them unattended for twenty-four hours; or if a railway company were for economy knowingly to expose cattle to a risk which they incurred thereby."

In argument in *Lewis v. G. W. Ry. Co.*, (e) ^{Lewis v. G. W. Ry. Co.} "wilful

(a) Per Bowen, L. J., in *Young & Harton's Contract*, 11 Ch. D. 169 at 170, commented on by Buckley, J., Bennett & Stone, [1902] 1 Ch. 220 at 232.

(b) 21 L. T. N. S. 121.

(c) At 124.

(d) At 125.

(e) *Lewis v. G. W. Ry. Co.*, 113 B. D. 195. A thing done intentionally and in the result wrongly is not necessarily wilful misconduct. *Cordery v. Cardiff Pure Ice and Cold Storage Co., Ltd.*, 19 T. L. R. 256. See also *Forder v. G. W. Ry. Co.*, [1905] 2 K. B. 532.

Chap. VII. misconduct" is defined as "doing wrong knowing that it will cause damage, 'wilful omission' might come within the definition" (a) In delivering judgment, Bramwell, L.J., says (b) " 'Wilful misconduct' means conduct to which the will is a party, something opposed to accident or negligence; the *mis*-conduct, not the *conduct* must be wilful. (c) It has been said, and I think, correctly, that perhaps one condition of 'wilful misconduct' must be that the person guilty of it should know that mischief will result from it. But to my mind there might be other 'wilful misconduct' I think it would be 'wilful misconduct' if a man did an act not knowing whether mischief would or would not result from it. I do not mean when in a state of ignorance, but after being told 'Now this may or may not be a right thing to do' He might say, 'Well, I do not know what is right, and I do not care, I will do this.' I am much inclined to think that that would be 'wilful misconduct,' because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not. I think that would be wilful misconduct." Brett, L.J., says (d) "Wilful misconduct "must mean the doing of something, or the omitting to do something, which it is wrong to do or to omit, where the person who is guilty of the act or the omission knows that the act which he is doing, or that which he is omitting to do, is a wrong thing to do or to omit; and it involves the knowledge of the person that the thing which he is doing is wrong; I think that if he knows that what he is doing will seriously damage the goods of a consignor, then he

(a) At 201.

(b) At 206

(c) Cited and approved in *In re Mayor of London and Tubbs's Contract*, [1894] 2 Ch. 524 at 536, 538.

(d) 3 Q. B. D. at 210.

knows that what he is doing is a wrong thing to do; and also, as my Lord has put it, if it is brought to his notice that what he is doing, or omitting to do, may seriously endanger the things which are to be sent and he wilfully persists in doing that against which he is warned, careless whether he may be doing damage or not, then I think he is doing a wrong thing, and that that is misconduct, and that, as he does it intentionally, he is guilty of 'wilful misconduct', or if he does, or omits to do something which everybody must know is likely to endanger or damage the goods, then it follows that he is doing that which he knows to be a wrong thing to do. Care must be taken to ascertain that it is not only misconduct but 'wilful misconduct,' and I think these two terms together import a knowledge of wrong on the part of the person who is supposed to be guilty of the act or omission." And Cotton, L.J., says (a): Cotton, L.J.
 "Now, I do not think there can be any doubt at all that 'wilful misconduct' is something entirely different from negligence and far beyond it, whether the negligence be culpable or gross, or howsoever denominated. There must be the doing of something which the person doing it knows will cause risk or injury, or the doing of an unusual thing with reference to the matter in hand, either in spite of warning or without care, regardless whether it will or will not cause injury."

Now as to "serious misconduct"—

The rule is *Verbis plene expressis omnino standum est*; (b) or, as Lord Esher expounds it in *Hannsey Local Board v. Monarch Investment Building Society* (c): "An Act of Parliament is to be construed according to the ordinary

Serious
misconduct,
Rule of
construction, § 4, p. 2.

(a) *L. C.* at 213

(b) Per Dr. Lushington, "The St. Cloud," *Bio. and Lush.* 17.

(c) 21 Q. B. D. 5.

Chap. VII. meaning of the words in the English language as applied to the subject-matter, unless there is some very strong ground derived from the context or reason why it should not be so construed."

On this subject Vaughan Williams, L.J.'s words in *Anderson v. Rayner*^(a) may be profitably noted. "I cannot assent to the suggestion of the plaintiff's counsel that it is an established canon of construction that, where you have an enactment passed in favour of a particular class it must be construed liberally. On the contrary, I think the old rule still prevails that, where you are dealing with an enactment which imposes on members of the community liabilities beyond those which would be imposed upon them by the common law, the enactment ought not to be construed as imposing upon them any liability that is not clearly indicated by its language." Mathew, L.J. assented.

Ordinary meaning.

The ordinary meaning of the word "serious" in the English language is -grave, weighty, earnest, important, as opposing to trifling and insignificant. "Serious misconduct," then, is misconduct which in ordinary cases could not readily be overlooked. But "serious misconduct" may be so designated either from its intrinsic qualities or from its consequences. It is probably only the former of these classes which will constitute "serious misconduct" under the Act.

Suggested cases

For instance, a breach of the statutory rule prescribed by the Coal Mines Regulation Act, 1887, (*b*) "no lamp or

(a) [1903] 1 K. B. at 591.

(b) 50 & 51 Vict. c. 58, s. 49, 1, 8. *Cp. ante*, 226. As to the statutory control given over persons in mines, see *Marrow v. Hardy and Broughdon Moor Coal and Fire Brick Co.*, [1898] 2 Q. B. 588. It "does not in any way alter the relationship of the contracting parties *inter se*, they [the rules] simply give control to the mine owner over persons in the mine so as to enforce the prescribed regulations for carrying on without danger the mining operations." For example, s. 8, sub-s. 2 of the Coal Mines Regulation Act, 1887, provides that: "The immediate employer of every

light other than a locked safety lamp shall be allowed or used," would in itself constitute "serious misconduct." The probable effect of the violation of the rule would be injury. The object of the rule is to preserve life and limb; and a violation of it, in the phrase of Brett, L.J., imports "a knowledge of wrong" on the part of the person breaking the rule, and not wrong merely in the breaking the rule, but a wrong that may likely extend beyond into untoward consequences.

But, possibly, a breach of rule 10 (iv) of the same Act, "A person shall not have in his possession any lucifer match or apparatus of any kind for striking a light," etc., would not be held "serious" within the section, supposing an explosion igniting the lucifer match and causing the man to sustain more severe injuries than he would have done had he observed the rules. The object of the rule is probably to guard against the temptation to strike a match, not against any damage from the mere possession of it, so long as it remains in the pocket. In the one case, the open lamp in the mine is a present menace to life and limb. In the other case the matches in the miner's pocket are innocent in ordinary and natural course so long as they remain there, and their presence may be due to oversight and not to active and wilful wrong-doing.

There must, too, be rules which are disciplinary or precautionary as distinguished from those whose direct and immediate object is the safety of the workmen and the

boy, other than the owner, agent or manager of the mine, before he causes the boy to be below ground in any mine shall report to the manager of the mine or to some person appointed by that manager that he is about to employ the boy in the mine." *PERKINS, Evans & Co., [1902] 1 K. B. 306*, is a decision under the Employers' Liability Act, 1880, that the signature of conditions by a workman of a contractor, binding himself to observe the regulations and conditions laid down for the safety of the mine and for the guidance of the persons employed therein, as consideration for being employed in the mine, did not create a contract of service between the workman and the colliery owners.

Chap. VII.

Chap VII. work, a neglect of which could not, apart from consequences, be taken as "serious." (a)

Principle discussed.

If, however, the violation of a rule is to be determined as "serious" by reason of its consequences, it is hard to see how, when wilful misconduct is proved, any additional element is added by the requirement that it should be "serious"; since in order to bring an accident within the Act at all it must be such as produces disability for a period of at least one week; (b) and, in the ordinary and natural use of the English language, anything producing such effects on a workman's capacity would not, with reference to the very probable requirements of himself and family, be otherwise designated than as serious.

Method of interpretation

The word used by the Legislature is "serious," and the arbitrator under the Act has, in the first instance, to put his interpretation upon it. The method by which he is to arrive at this is a familiar method in law. It is resorted to in the determination of questions like what is a reasonable time for presenting negotiable paper, or what shortcomings in conduct are regarded in law as negligent.

In cases under the Act the presence of a jury is dispensed with, and the whole procedure centres in the arbitrator who has himself to exercise the functions both of a judge and of a jury in the matter.

Standard of conduct.

In the first place the standard of conduct by which the particular facts have to be judged has to be prescribed. (c) If there already exists any standard in the

(a) Cp. Proposition XII., Chapter III., Part I., *act*, 62. See also Propositions XV.-XVIII., Chapter II., Part I., *act*, 35.

(b) S. 1 (2), *act*, 299.

(c) I know of no place where the theory of the formation of a standard of conduct is so well treated as in Holmes' *The Common Law*, particularly at 123-126.

matter this is to be adopted. If, for instance, daily Chap VII.
experience prescribes a sufficiently definite rule of what is
"serious misconduct," the rule is to be followed. If, as is ^{Standard of}
probably the case in the present instance, no sufficiently ^{conduct}
definite rule exists, one has to be formed. This will be
done by approximately similar states of fact recurring
frequently in practice, and similar decisions by degrees
hardening into rules. Until the materials for eliciting a
rule exist, each decision must stand upon the exercise by
the arbitrator of his judgment determining (1) approxi-
mately what is the standard to be set up, and (2) whether
the conduct in the case before him attains that standard.

So soon as the number of particular decisions admits of
a general rule being formed, this general rule ought to be
applied, and the standard having been ascertained, the
arbitrator, in the absence of a jury, has to determine what,
in cases where there is a jury, is the jury's peculiar
province whether in the particular case the facts reach
the standard.

The qualification of misconduct as "serious" has the
effect of narrowing the meaning of "misconduct" merely.
The distinction probably taken is between that misconduct
which viewed antecedently may be breach of discipline,
or tending to mismanagement, but which would not suggest
as its probable consequence peril to life or limb; and that
misconduct which, if contemplated by a reasonably prudent
man in the position in all respects of the wrong-doer,
would suggest as a probable consequence injury to life
or limb.

To constitute "serious misconduct," then, it is probable ^{Summary.}
that the Legislature intended to signify conduct that an
average workman in being guilty of either would know,
or ought to know, if he turned his ~~eye~~ consider the

Chap. VII matter, to be conduct likely to jeopardise his own and his fellow-workmen's safety. (a)

Arbitrator may submit question to County Court judge.

But the arbitrator may submit any question of law for the decision of the County Court judge. (b) and on this point of "wilful and serious misconduct," three questions of law may be raised. -

- (1) What is the correct standard of conduct? What, that is, are the elements which are to be, or may be, considered in arriving at a conclusion of what is "serious and wilful misconduct"?
- (2) Whether there is any evidence of the facts which the arbitrator takes as proved in any given case?
- (3) Assuming there to be evidence, are the facts sufficient to warrant the inference of "serious and wilful misconduct" being drawn from them? (c)

State of the authorities as to "serious and wilful misconduct."

In *Rimbold v. Nunnery Colliery Co* in the Court of Appeal, (d) Smith, L.J., adopted the proposition "that it was not right to say that every violation by a workman of any of the rules, general or special, framed for the regulation of coal mines must necessarily render the man guilty of 'serious and wilful misconduct' within the meaning of the Workmen's Compensation Act. Such a proposition could not be laid down as a matter of law, but it was necessary in each case to consider the particular circumstances."

Douglas v. United Mineral Mining Co.

Douglas v. United Mineral Mining Co., Ltd., (e) has been noticed in connection with the cases treating of the course of employment, where its bearing on the present

(a) Propositions VI-IX, Chapter III, Part I, *ibid.*, 56

(b) Second Schedule (1) *ibid.*, 336

(c) See *Colonial Securities Trust Co v. Massey*, 1896, 1 Q. B. 38

(d) Times newspaper, 6th Feb., 1899, 50 L. T. 42. See *Fall v. Hodgkin & Barclay & Logue*, 38 St. L. R. 736, 3 F. 1006.

(e) Times newspaper, 20th February, 1900, 2 W. C. C. 15

matter as manifested by the finding of "fact" by the County Court judge, was glanced at. (a) In *Dailly v. Watson* (b), however, the Sheriff was even more liberal than the County Court judge in the earlier case, and held that a miner who, in breach of a special rule of the mine, wore a naked lamp in his cap while carrying cartridges not enclosed in a case or canister, was not guilty of "serious and wilful misconduct." The Court of Session reversed this, holding that the miner's conduct constituted in law "serious and wilful misconduct." Any other decision would have practically deleted these words from the Act. The way the conclusion of the Court was worked out may have been that there was evidence of the workman's knowledge of the rule, with appreciation of it, and of a wilful or reckless breach of it; and thus evidence of serious and wilful misconduct, which, un rebutted, must be acted on. Where evidence of facts exists which is not contradicted, and which the judge cannot disbelieve, he is not at liberty to disregard it or to act contrary thereto. That the judges intended to ignore the element of fact that must always be present in these cases is a belief not lightly to be entertained.

The two cases last noticed, decided respectively by the English and Scottish Courts, moreover, illustrate a difficulty constantly arising. In the Court of Appeal, at least one of its members was obviously not content with the finding of the County Court judge, yet the finding stood, because the Court was able to discover some possible evidence for it and the members of the Court professed themselves not entitled to interfere. Had the Court fixed a standard, however low that standard might be, it is hardly possible that the facts indicating serious and wilful misconduct should be outside it. The Scottish Court on the other hand framed for themselves

(a) *Ante*, 384.

(b) 1890 0 F 1044.

Chap. VII. — a definition of the words, and, determining that the particular facts could not be brought within the formula, or indeed, within any reasonable formula, reversed the Sheriff. The course adopted by the Scottish Court is obviously the more correct. Definition is always a matter for the Court. Whether the words can mean any particular thing is the preliminary question for the Court. Whether they do is for the subsequent determination of the jury, (a) and no one would contend that the notion of serious and wilful misconduct is so unformed as not to admit of any generalization of it. Collins, J.J., puts the point neatly in *Roper v. Greenwood* (b) — "When we are dealing with a word in an Act of Parliament, before we can arrive at a decision of fact as to whether that which the word in question means has taken place or not, we must adopt some standard of what the word means. That involves a proposition of law as well as of fact. The County Court judge, therefore, has two duties to perform; he must incidentally direct himself as to the meaning of the Act of Parliament, and then he must find, as a jury, whether that which the Act of Parliament means has taken place. It seems to me that the judge cannot find upon the question of fact without adopting some standard of the meaning of the Act. If then the County Court judge has misdirected himself as to the meaning of the Act, we ought to send the case back to him for a new trial. If the facts admit of only one inference, and the judge has so found that he must have misdirected himself as to the law, it would be right to send the case back to him." (c)

(a) See per Lord Cairns, *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. 193 at 197.

(b) 83 L. T. R. 471, 3 W. C. C. 23 at 27. See per the same learned judge, *Fenn v. Miller*, [1900] 1 Q. B. 788 at 792; and *Ferguson v. Green*, [1901] 1 K. B. 25 at 29.

(c) Cp. *Hoddinott v. Newton, Chambers & Co.*, [1901] A. C. 49 at 56 and 68.

This failure to have some standard before the Court will explain decisions otherwise unaccountable. The finding of the County Court judge is in all these instances affirmed, whether imputing serious and wilful misconduct or refusing to do so. Any continuity of decision is thus impossible, depending as the cases do on the fluctuating views and insight and, possibly, prejudices of the County Court bench.

Chap. VII.

In *Ross v. Powell Duffryn Steam Coal Co.* (a) the Court of Appeal reversed the County Court judge, who held that a collier was guilty of serious and wilful misconduct who, returning to the lamp station in the mine to re-light his lamp, passed along a way over which trains were being hauled by a rope. Though told that a train was being hauled he proceeded and was injured by the breaking of a rope as he was making for a manhole. Manifestly here the injury was not the result of his misconduct, supposing there was misconduct, but was due to the breaking of the rope.

*Ross v. Powell
Duffryn Steam
Coal Co.*

John v. Allbon Coal Co., Ltd. (b) turns on somewhat similar facts. A miner experienced in the respondents' mine left his work and was walking along the main haulage road with some other men when the rope began to move and the trains started. One of the men at the first manhole told the miner to come into the manhole as the trains were not far off. He refused, and walked on, passing six manholes and had just reached the seventh, when he was overtaken and killed. The County Court judge found serious

*John v. Allbon
Coal Co., Ltd.*

(a) 61 T. T. 161. With this accord, *Sneddon v. Glasgow Coal Co.*, 7 F. 181. There a miner in breach of regulations was riding on the top of a loaded tram through a tunnel when he was killed by a stone that fell from the roof. No evidence connected the fall of the stone with the man being on the tram, therefore the injury was not attributable to the misconduct.

(b) 18 T. L. R. 27.

Chap. VII and wilful misconduct, and the Court of Appeal refused to disturb his finding on the grounds that there was evidence for it.

Germ of a principle of decision.

An endeavour to formulate some guiding principles was made by the judge of the Winchester County Court in *Jones v. London and S.W. Ry. Co.*, (a) and the case is interesting as an English decision in this connection not decided merely by rule of thumb. The fireman of a railway engine was missed by the driver between two stations. He turned and discovered him lying on the coals at the rear of the tender. The fireman had obviously been struck on the back of his head. At the next station he was found to be dead. He had struck against an arch in going into the well of the tender, while the train was in motion, to get coal. This was both unnecessary and forbidden by special notices brought to the knowledge of the deceased man. The judge decided that "as matter of law" it was serious and wilful misconduct to violate the general directions and rules, of which the fireman had full notice; that is, probably, that on the admitted facts only one conclusion could be drawn.

The case was not taken to the Court of Appeal. Judging from precedent, had it been, the Court would have affirmed the County Court judge, holding that there was evidence for his finding "as a fact," and ignoring his attempt to reach a principle.

Scottish decisions seek a principle.

The Scotch Courts, however, are in accord with this finding "of law," this indication of a minimum line below which conduct in ordinary cases could not go without carrying the legal inference of "serious and wilful misconduct," though even here the interposition of another fact, or the alteration in proportions of two facts, might make all

(a) L. T. newspaper, 29th June, 1901, 3 W. C. C. 46.

the difference. In *Callaghan v. Maxwell*, (a) for example, Chap. VII. a farm servant employed on the platform of a steam threshing machine in passing sheaves to the millman was directed to remain in her place, and, moreover, was warned what would result if she disobeyed. Nevertheless, she left her place to gossip with an acquaintance and lost her leg. The sheriff substitute found she was not guilty of "serious and wilful misconduct", but he was reversed, the Lord Justice Clerk in particular expressing the opinion that there could be no more pronounced case of wilful misconduct than disobedience to a specific order given to safeguard the disobedient person. Another Scotch case already noticed is to the same effect. In *Guthrie v. House Spinning Co.* (b) there was an express order not to clean machinery. The machinery was stopped at regular intervals for cleaning. Disobedience to this order was held "serious and wilful misconduct." Two other Scottish cases have gone further than, probably in view of the opinions pronounced in the House of Lords in two cases we are in a moment to consider, the English Courts would follow. In *Vaughan v. Nicoll* (c) a farm servant in charge of a horse and cart tied the reins to a wheel which worked a brake. An accident happened in consequence. He was held guilty of serious and wilful misconduct. But an appeal was disallowed, as it involved only a question of fact which the Court will not entertain.

Drunkenness, which was solely the cause of an accident, was held serious and wilful misconduct in *McIntosh v. John Brown & Co., Ltd.* (d). In these and similar cases the real solution is that the law and the fact is so intermixed that the conclusion that in any particular case arrived at

(a) 35 Sc. L. R. 313, 2 F. 120.

(b) 3 F. 509, 38 Sc. L. R. 183.

(c) 8 F. 164.

(d) 8 F. 809. Cp. *Burrell v. Avis*, 106 L. T. newspaper, 61.

Chap VII

might by a very slight variation of the facts be of quite another complexion. A finding in a case that conduct is not wilful and serious, which according to all ordinary use of language is obviously so, raises a question of law, for it reasons from the hypothesis that language, not susceptible of such a meaning, is capable of the meaning and so is a subject of appeal in law; but there are a number of nebulous questions in the debatable land that when they have been decided one way as matter of fact do not admit of appeal. The attributing these to their right classification is matter of experience for which no certain rule is to be given.

Disobedience
with serious
consequences
not necessarily
"wilful"

Though there may be disobedience with most serious consequences, it by no means follows that it is wilful in the sense of the Act. Thus, a boy working at a machine used for cutting screws leaned over a circular saw to pick up an uncut screw which had fallen from its place; in doing so he injured his finger. He had been frequently warned. The Court of Appeal were of opinion that the *prima facie* inference arising on the facts was that the element of wilfulness did not enter at all into what he did, but that he acted from sudden impulse (a).

By the terms of the Act (b) the workman is entitled to his compensation unless it is proved that his injury is attributable to his serious and wilful misconduct, and thus it is plain that the *onus* is on the employer to prove this. The Courts have refused to treat the proof as matter of *res ipsa loquitur* requiring rebutting testimony; and it may be taken that to discharge the employer direct, and not merely inferential, evidence will be required. A landslide having happened on the appellants' railway, two workmen were employed as night watchmen—one to be at the site of the

(a) *Becks v. Kynoch, Ltd*, 18 T. L. R. 84.

(b) S. 1 (2) (c), *ante*, 300. *Hapelman v. Poole*, Times newspaper, December 8th, 1906.

landslip, where there was a fire, the other down the line to warn approaching trains. Both men shortly before the accident were by the fire. He whose duty it was to be there fell asleep; on waking he found that the other had been killed by a train. The sheriff refused to draw the inference that he was asleep, or that he was guilty of serious and wilful misconduct; or even supposing that he was, that the accident was attributable to the misconduct. The Court declined to interfere, as on the facts found no question of law could arise (a).

In *Johnson v. Marshall, Sons & Co.*, (b) the matter was brought before the House of Lords. A workman was found fatally injured in a lift on his employers' premises without a load. The rule of the employment was that no man was to use the lift if he did not have a load. The *onus* was the employers' to show "serious and wilful misconduct." Lord Foreburn, C., considered the word "wilful" to import "that the misconduct was deliberate, not merely a thoughtless act on the spur of the moment." "Serious" he held to imply "not that the actual consequences were serious, but that the misconduct itself was so." The intention of the 1897 Act, says Lord James of Hereford, (c) was "to make the business bear the burthen of the accidents that arose in course of the employment, and relief from this liability is not found even if the injured workman be guilty of negligence. The doctrine of contributory negligence was superseded by the Act." Lord Robertson (d) took a somewhat stricter view, and thought that "a breach of a regulation committed intentionally and of choice, the regulation directly relating to personal safety, might well come within the language, even although the thing done did not involve anything morally censurable." In the

Johnson v. Marshall, Sons & Co.

Lord Robertson's view

(a) *Glasgow & S. W. Ry. Co. v. Landlaw*, 2 F. 709. See Proposition XXI, Chapter III, Part I, *ante*, 57.

(b) (1906) A.C. 409. (c) *L. v. 412.* (d) *L. v. 414.*

Chap VII.

Bliss v London & S.W. Ry. Co

later case, also in the House of Lords, of *Bliss v. London & S.W. Ry. Co.*, (a) the remarks of Lord James of Hereford indicate an apprehension that the horse was reeling from the consequences of then holding in *Johnson v. Marshall*. An engine driver left the footplate of his engine and mounted the tender to get coal while the train was in the course of its journey, and was killed by collision with a bridge. He "broke a rule which certainly is a very serious rule. There is evidence that he knew of its existence, and that he knowingly and wilfully acted in defiance of it. It was a rule to save life and prevent danger both to the public and to the servants of the company." "I think," said Lord Lancelburn, (1), (b) "the duty of the Court is to insist that there shall be sufficient proof, and to scrutinize that proof, bearing always in mind that negligence will not suffice." "Both wilful and serious conduct is involved," says Lord Halsbury, (c) "in doing that which would undoubtedly expose to danger both the man himself and those who in a certain sense are under his charge." The addition of this altruistic element, not the consequences to the misdoer, but to those exposed to the consequences of his misdoing, is a valuable addition to the elements, the consideration of which is to fix the character of the Act.

Brooker v Warren

Even had the consequences of the misconduct in *Brooker v. Warren* (d) not been serious it could hardly be intelligently contended that the misconduct itself was not. The workman there had a noted objection to the provisions of sec. 10, subsec. 1 (e) of the Factory and Workshop Act, 1901, which makes the requirement that an effective guard (a recent invention, not approved by the workman) shall be used while working with circular saws. Both the Inspector of Factories and the employer directed the workman to use the guard.

(a) [1907] A. C. 209

(b) *L. v. 211. See George v Glasgow Canal Co.* in H. of L., 21 T. L. R. 57.

(c) *L. v. 212.*

(d) 23 T. L. R. 201.

He refused, and in the course of his work an accident happened, and he was killed in consequence of his default. The Court of Appeal held him guilty of "serious and wilful misconduct." "He was guilty of misconduct in deliberately and intentionally refusing to obey the order to use the guard, and the misconduct was serious because it produced a condition of danger to himself and others." Here also it may be well to note the common peril was an element in fixing the character of the Act.

The effect of these later cases is fatal to the authority of many of the earlier. For example, in *McNicol v. Spence, Gibb & Co.* (a) it had been decided that because the workman did not know of the statutory rules which he had violated and had acted in accordance with the practice of the mine, he was entitled to compensation when he was injured, but in *O'Hara v. Colzow Coal Co., Ltd.*, (b) the Court of Session held that breach of a statutory rule from which an accident resulted was in itself "serious and wilful misconduct." They followed this ruling in *Condon v. Gavin, Paul & Sons, Ltd.*, (c) and in *Dobson v. United Collieries, Ltd.*, (d) where a miner was injured through having a naked light in his cap while working with explosives, and the Sheriff found that the workman did not know the rule prohibiting this. A Court of seven judges sat to determine the principle applicable. This they held to be that acting in breach of a duly published statutory rule where there is no dominant reason for so doing is "serious and wilful misconduct"; and that ignorance of the rule can in no circumstances be an excuse. The conduct of the workman in this case as a matter of fact, without any accentuating from the rules, seems in the highest degree reprehensible, yet in the words

(a) 1 F. 604

(b) 5 F. 489.

(c) 6 F. 29

(d) 8 F. 241 was distinguished, *Pratt v. Broxburn Oil Co., Ltd.*, [1907] S. C. 581, but followed *George v. Glasgow Coal Co.*, 45 Sc. L. R. 686, in H. L. 25 T. L. R. 57.

Chap. VII. of Lord Loreburn it might have been "merely a thoughtless act on the spur of the moment," and if so, the wrong criterion was applied, (a) for the determination of this question of the fact was necessary. (b)

Reddon v Glasgow Coal Co.

In *Glasgow Coal Co v Smekdon* (c) there was breach of a statutory rule, yet the injury alleged, caused by the fall of a stone from the roof of the mine which killed the man, was not attributable to the breach; and consequently compensation was allowed to his dependants though the workman had broken a statutory rule yet the accident was due to something else which, if a rash and foolish act, was not "serious and wilful misconduct."

The recitation of this long catalogue of cases and the examination of the principles applicable have seemed expedient because the proviso about serious and wilful misconduct is still retained in the Act. The exemption from the consequences where injury results in death or serious and permanent disablement has, however, deprived the proviso of most of its importance.

NO DOUBLE COMPENSATION

Employer not liable both independently of and also under the Act.

There is one other limitation to the right to compensation under the Act remaining for consideration. The remedy of the workman against his employer, either at common law (d) or under the Employers Liability Act, 1880, (e) is preserved to him, but the employer is not liable both independently of and also under the Act (f).

Common law rules.

We may shortly recapitulate what the rights of the workman are—

(a) [1906] A. C. 412. *Rock v Kynoch*, 18 T. L. R. 31, *Whitehead v. Render*, [1901] 2 K. B. 48. *George v Glasgow Coal Co* in H. of L., 25 T. L. R. 57.

(b) *Cp. Pratley v Broxburn Oil Co.*, [1907] 8 G. 581, *Wallace v. Glenburg Union, etc., Co.*, [1907] S. C. 967.

(c) *Ante*, 19 *et seqq.* (e) *Ante*, 131 *et seqq.* (f) § 1 (2) (b) *Ante*, 300.

(1) At common law, and

(2) Under the Employers Liability Act

(1) At common law the employer is liable for the acts of his workmen to third persons if he directs the acts, or if they are done in the course of the workman's employment (*a*)

At common law the employer is liable to a workman injured by another of his workmen, if the injuring and the injured workman, though having a common master, are not in a common employment. (*b*)

Since *Wilson v. Merry*, (*c*) the rule of the common law has been incontrovertible that there is no legal duty on the employer to answer to one person in his employment for the injurious acts of any other person in the same employment, even though the injurious person is a manager appointed by authority of an Act of Parliament (*d*)

The only persons for whose acts or defaults, occurring and causing injury to a workman in the course of the employment, the employer would be responsible at common law are—

(i) A partner; (*e*)

(ii) An incompetent servant, of whose incompetency the employer has knowledge or the means of knowledge (*f*)

The employer would be liable for the "wilful" acts of these, so far as the acts are done in the course of the employment, on the ground that he is guilty of "personal negligence" Beyond this there is no liability.

(*a*) *Ante*, III *et seqq*

(*b*) Chapter I, "Common Employment" *Ante*, 13, and Propositions XXI-XXV, Chapter II., Part I *Ante*, 41 *et seqq*.

(*c*) (1868) L. R. 1 Sc. App. 326

(*d*) *Howells v. Landon Steel Co.*, L. R. 10 Q. B. 62.

(*e*) Proposition III, Chapter II., Part I *Ante*, 21.

(*f*) Proposition IV., Chapter II., Part I. *Ante*, 22.

Chap. VII. A case, then, like *Limpus v. London General Omnibus Company* (a) has no bearing on the relation of master and servant, except in so far as the injury shed on is one done by a partner or by an incompetent servant. In other cases, if the wilful act done were outside the scope of the employment, by the very statement of the case, it is plain there can be no liability. If again the wilful act done were within the scope of employment, it would be also within the rule under which one servant takes the risks of the other servants' conduct. (b)

Effect of the
Employers
Liability Act,
1880.

(2) The Employers Liability Act 1880, extends the employer's liability by making the employer liable for the negligence of his servants in the circumstances enumerated in the 1st and 2nd secs. of the Act (c). To the extent indicated by the Act the employer is rendered liable for the wilful acts of the servants whose position is there dealt with. He is liable not because the acts are wilful, but because they are negligent. True, they are acts which the servant does of his own free volition, but none the less for that are they acts, done while in the exercise of the employer's business, which fall below the standard of care, the attainment of which is the sole justification of entering on the employment.

The Act prescribes duties on the part of the master in respect of the workmen beyond what before existed. Accordingly, if a superintendent or other servant within the Act pursuing his master's interests, as he regards them, does something whereby personal injury is caused to a workman, his act is a wilful act, in so far as it is the result of a deliberate choice of means, but it is no less a negligent

(a) *Limpus v. London General Omnibus Co.*, 1 H. & C. 526. *Ante*, 145.

(b) Propositions II. and XXI., Chapter II., Part I. *Ante*, 20, 41.

(c) *Ante*, 124.

one, in that, having by law to safeguard the workman, he **Chap. VII.**
 prefers some other object and overlooks his first concern.

Apart from this class of cases, the Employers Liability Act, 1880, does not deal with wilful acts—does not deal with them, that is, otherwise than as they are the overt indications of neglect of statutory duty—and there is no greater liability imposed than previously existed at common law.

This consideration will explain difficulties sometimes arising, where it is sought to shift the liability for negligence on the ground that the act complained of was foreseen and deliberately calculated. The cause of action is, nevertheless, rightly negligence, for the wilful act implies an ignoring of the legal duty which the law makes of first consideration. So much for the law independent of the present Act.

Turning then to the law as modified by the Workmen's Compensation Act, 1906, the proviso dealing with this says: "When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer . . . but the employer . . . shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid" (a).

No double recovery.

The consideration of the remedy that the employer has, where he has been ordered to pay compensation under the Workmen's Compensation Acts, but has an indemnity over against some one else, will be deferred till we are dealing with procedure, (b) as the method indicated gives no new right, but points out a course of procedure that may be

(a) *Ante*, 300.

(b) *Post*, 687.

Chap. VII. adopted where the workman has preferred the remedy given by the Act to pursuing the right which he has at common law and which becomes enforceable by the master. Probably an action for damages caused by injuring the servant might be brought apart from this Act, and damages not only to the extent of the indemnity pointed out might be obtained, but additional damages also, in some cases at least for loss of service (*10*).

*Workmen's
comp.*

By the Act the workman has his option either to claim thereunder or to resort to the remedies that existed previously to its passing. Apart from enactment the common law would have precluded him from a double remedy; but the words of the Act add a statutory assurance. The words of the first section of the Act, moreover, summarise the workman's rights independently of the Act as "injuries caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible."

The first points to determine are what this option is and how it may be exercised.

At one time the view was prevalent that the remedy under the Act was cumulated upon the existing rights of the workman, and that assuming him to bring a common law action against his employer and to fail, he might still take proceedings under the Act provided that he did not infringe the time-limits. This view has been decided to be erroneous by the Court of Appeal, and he can only in those circumstances obtain the benefit of the Act by availing himself of the provisions of sec. 1 (1) (*b*).

The decision has been confirmed by authority, but the

(a) *Alton v. Midland Ry. Co.*, 34 L. J. C. P. 292. See *Taylor v. Manchester, Sheffield & Lanc. Ry. Co.*, [1895] 1 Q. B. 134, *Moux v. G. E. Ry. Co.*, [1895] 2 Q. B. 387.

(b) *Id.*, 801.

reasoning at least on one portion of the case that decided this is far from unexceptionable (a). An action under the Employers' Liability Act, 1880, had proved unsuccessful. Subsequently independent proceedings were begun under the Workmen's Compensation Act, and the judge made an award. On the appeal the award was set aside on the ground, as stated by Smith, L.J., that under ordinary circumstances the defeated plaintiff, under the Employers' Liability Act, 1880, would have been met by the defence of *res judicata*, and that proceedings "in respect of any matters arising out of the same accident" would have been impossible but for the provisions of sec. 1 (1), which confers rights on the workman, when he has exercised his option in bringing a common law action and failed. The workman must therefore follow the prescribed procedure and apply at the trial to an assessment of compensation. Independent proceedings cannot be taken.

So far as this reasoning depends on an affirmation that a workman who fails in a common law action can only establish a claim under the Act by putting the same facts before the arbitrator to establish his claim, it is by no means convincing, for example, he may fail in his action by being shown guilty of contributory negligence at common law, but under the Act this may not amount to "serious and wilful misconduct." Every fact established on the first inquiry may be admitted on the second indeed prayed in aid, without conflicting with the conclusion in favour of the appellant on the second. Both conclusions may well stand together—certainly the material facts on the second inquiry are not *res judicata*. (b) As Fitzgibbon,

(a) *Edwards v. Godfrey*, [1899] 2 Q. B. 333.

(b) *The Queen v. Hutchings*, 6 Q. B. D. 300. *Duchess of Kingston's Case*, 2 Sm. L. C. (11th ed.) 731.

Chap VII L.J., says in *Beckley v. Scott* (a), "The ground of dismissal had nothing to do with the right of suit for damages upon the civil liability, and it could not operate a determination that such liability did not exist."

Fagan v. Reed Brothers.

However, in *Fagan v. Reed Brothers*, (b) the Court of Appeal followed *Edwards v. Godfrey*, holding that the applicant could not, after having elected to proceed with an action at common law, afterwards take separate proceedings under the Workmen's Compensation Act. Dismissing the unsatisfactory ground of *res judicata* altogether, this decision may be maintained by the consideration that the new remedy is given by sec 1 of the Act, which in sub-sec. (1) points out the circumstances in which, after the failure of an action, compensation may be had, and that none can be had save in the way provided. (c) The application must be made at once on the determination of the common law or employer's liability claim, "then and there."

Beckley v. Scott

The Irish judges were very divided in *Beckley v. Scott* & Co (d) on the question whether a right to damages existing independently of the Act is so affected by a claim for compensation under the Act that the right to sue for damages at common law is taken away by the workman's exercise of the option which the Act gives him to "claim compensation." A claim had been made under the Act, which claim had been disallowed, under the decisions as they then stood, on the ground that the provisions of the Act did not apply to the case. The applicant then began an action at common law. His right to do so was objected to; but the majority of the Irish Court of Appeal held that the true construction

(a) Weekly Notes, 1903 at 175, [1903] 2 I. R. 574

(b) Times newspaper, 6th June, 1909.

(c) The Scotch case is *Baird v. Higginbotham & Co., Ltd*, 88 Sc. L. R. 479.

(d) [1902] 2 I. R. 504, W. N. 1903, 173.

of sec. 1, sub-sec. 2 (b) of the Act of 1897, which is identical with the Act of 1906, confines the protection "to double payment," and "that it is not the mere claim but the recovery of compensation under the Act which puts an end to the civil liability to damages, which is otherwise not to be affected by anything in the Act." *Edwards v. Godfrey* (a) was distinguished as being under sub-sec. 1. *Holmes, L.J.* dissented. "As I understand the English language," he said, "when an option is given to a person to take either of two courses, he is not to take both, and as I understand legal principle, an option or election of this kind once exercised must be adhered to." "The opening words of the clause (sec. 1, sub-sec. 2 (b)) are merely intended to preserve such rights as the workman had outside the Act, provided he desires to rely on them. Admittedly, the recovery of compensation under the statute would deprive him of these rights, and there is nothing inconsistent in a provision that his making a claim for compensation would have a similar effect." "The Legislature, in conferring on workmen a new and most valuable right of compensation for personal injuries, provides that when they elect to avail themselves thereof, they abandon other modes of recovering damages for the same injuries." "The 1th subsection seems to me to aid the construction I have adopted, and to take away all reasonable grounds of complaint to which the option clause might otherwise have given rise." "I think that the idea underlying it was to relieve him [the workman] to a certain extent, and without undue prejudice to the employer, from the embarrassment of the option clause. In a doubtful case he can sue independently of the Act; and, if he fails, the Court that tries the case can award him compensation under the Act if he is entitled to it."

Chap VII.

Holmes, L.J.
dissenting
judgment

(a) [1899] 2 Q. B. 333.

Chap VII

*Isaacson v. New
Grand (Clapham
Junction)*

In *Isaacson v. New Grand (Clapham Junction), Ltd.*, (a) Lord Alverstone, C.J. (with whom Wills and Channell, J.J. concurred), held that "the condition which allows the plaintiff to exercise the option is that the defendant is not liable in the action under the Employers Liability Act," or at common law, as the case may be. The case in which this was said was one where an action under the Employers Liability Act had been dismissed with costs; and where the plaintiff, though applying for compensation under the Workmen's Act, was desirous of appealing against the decision under the other Act, and establishing a liability thereunder. Lord Alverstone's view was "That if the plaintiff intends to appeal he may . . . have to make an application *pro forma* to the County Court judge to assess the compensation under the Workmen's Compensation Act and to ask that the application may stand over until the appeal has been heard. It cannot be that because the County Court judge has wrongly determined the action in favour of the defendants the plaintiffs are debarred from taking any further proceedings, and we ought not to decide that we are powerless because the plaintiffs took this step before the County Court judge with a view to the protection of their rights."

*Taylor v. Ham-
stead Colliery
Co.*

The next case dealing with the impact of the option approaches it from a different point of view. The plaintiff in *Taylor v. Hamstead Colliery Co.* (b) sued in respect of the death of a workman who had worked at a colliery on the terms of a scheme of compensation under sec. 3 of the Workmen's Compensation Act, 1897. The contention for the defendants in the action was that the deceased man had exercised his option under the Act, and had elected to take the benefits provided by the scheme. The Court of Appeal held that "the provisions of the scheme are substituted for

(a) [1908] 1 K. B. 589. (b) [1904] 1 K. B. 838.

the provisions of the Act. If he [the deceased workman] had proceeded under the provisions of the Act he would have been debarred from taking proceedings independently of the Act, and he is in the same position when proceeding under the provisions of a scheme which are substituted for the provisions of the Act." Mathew, J.J., observed, "As to the case of *Beekley v. Scott & Co.*, I only wish to add that I am impressed by the reasoning of Holmes, J.J., who dissented from the judgment of the majority of the Court" (a). This decision overruled that of the Divisional Court (Wills and Kennedy, J.J.s), before whom, with the addition of Lord Alverstone, C.J., the next case, *Rouse v. Rouse v. Dixon*,¹⁰⁰ came. A workman claimed compensation under the Workmen's Compensation Act. After the employer had filed his answer, the workman gave notice withdrawing his claim for compensation and brought an action for damages under the Employers' Liability Act. Thus the Divisional Court held that he could do, "because the case does not come within the Act at all, the right of the workman to make any other claim is not lost." "At any rate," says Lord Alverstone, "I am clearly of opinion that there is nothing in the Act to lead to the extraordinary result that, where a claim is made under the Act, but withdrawn before there has been any decision upon it, all other liability on the part of the master is thereby wiped out. In my opinion the intention of the Act was only to prevent the master from being liable to pay twice over." "To my mind the reasoning of the decision in *Beekley v. Scott* is unanswerable, and is not inconsistent with *Edwards v. Godfrey*." Kennedy, J., acquiesced apparently with some reluctance, and with the remark that "it would certainly be very hard

(a) Cf. *William v. Vauxhall Colliery Co., Ltd.*, [1907] 2 K. B. 493.

(b) [1904] 2 K. B. 628.

Chap. VII. on the workman if he were barred from all other rights by anything short of a decision "

Neale v. Electric and Ordnance Accessories Co.

In the Court of Appeal in *Neale v. Electric and Ordnance Accessories Co., Ltd.*, (a) it was argued that that case was concluded by *Isaacson v. New Grand Clapham Junction, Ltd.*, decided in the Divisional Court. "It was there held that the mere application for an assessment of compensation under the Workmen's Compensation Act, 1897, upon the dismissal of an action under the Employers Liability Act did not amount to the exercise of an option so as to estop the plaintiff from appealing against the dismissal of the action." "Here the matter did not stop short at a mere application, but ripened into an award of compensation, which is unimpeachable. Therefore the two cases are quite distinguishable." But the Court of Appeal also thus laid down the principle applicable. "Sec. 1, sub-sec. (2) (b) " gives the workman in cases to which it applies an option whether he will claim compensation under the Act or take proceedings against the employer independently of the Act; but having that option he must take it subject to the condition on which it is given, namely, that though he may have one of two modes of relief, he cannot have both. Therefore a concluded election to accept one of these modes of relief operates to debar him from claiming the other." (b) To this there is the saving given by sub-sec. 1.

Cribb v. Kynoch.

The decision in *Neale v. Electric and Ordnance Accessories Co., Ltd.*, was held by the Court of Appeal in *Cribb v. Kynoch* (No. 2), (c) to involve the proposition that, under sec. 1, sub-sec. (4), if the workman within the six months brings his action to enforce the common law liability and fails, he may in the action have an assessment of the

(a) [1906] 2 K. B. 558

(b) *Per Collins, M.R.*, at 564

(c) [1906] 2 K. B. 551, 24 T. L. R. 736.

compensation payable in respect of the statutory liability; Chap. VII. while it confers a benefit upon the employer in that it allows the County Court judge to deduct from such compensation all the costs of the debited action. "This is . . . to be the only means by which the plaintiff in a defeated action is to be entitled after the expiration of the six months to recover the statutory compensation."

Cubbe v. Kymeh, Ltd., also, so far as the English Courts short of the House of Lords go, settled the question raised in *Beckley v. Scott* (a), whether the prosecution of a remedy, even though it subsequently is found that the remedy is not applicable in the particular case, is an insuperable impediment to other proceedings either under the Workmen's Compensation Act or otherwise. Holmes, L.J.'s view was taken, and Cozens-Hardy, M.R., adopted into his judgment the passage in Holmes, L.J.'s judgment immediately preceding that already quoted: "If the employer is not to be liable to pay compensation both under and independently of the Act, is he to be subjected to the expense, trouble, and inconvenience of two sets of proceedings? In many cases the question at issue in a claim under the Act and in a common law action for damages is the same. If I am to judge by what I read and hear, claims for compensation are often resisted on the ground that the injury is attributable to the serious and wilful misconduct of the workman—and two or three of the most recent cases before this Court have turned on this point. But this is a good defence to an action for damages; and it would seem highly unreasonable that a matter that had been fought out and adjudicated upon in one tribunal could be forthwith reopened in another. I think that it must have been the desire to guard against an employer being subjected to two law suits to recover compensation

Beckley v. Scott
overruled as an
authority in
England.

(a) [1902] 2 L. R. 504,

Chap. VII. for the same injury that led to the introduction, immediately after the provision that seems to the workman his old right of action, of the remarkable words, 'but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act.' The effect of the section, at least in England, is now established to be "that a workman cannot proceed to trial under the Act and fail, and then proceed by common law action, and also cannot proceed by common law action, and having failed in that action then proceed under the Act" (a).

The wording of this proposition accords with the suggestion of Kennedy, J., in *Rouse v. Dixon*, that nothing "short of a decision" would avail to make an option. But this inference does not quite accord with the reasoning of Holmes, L.J., in the passage read from his judgment by Cozens-Hardy, M.R., which lays stress on the "expense, trouble, and inconvenience of two sets of proceedings," nor yet with the judgment of the Court of Appeal in *Noble v. Electric and Ordnance Accessories Co., Ltd.*, that a concluded election to take one mode of relief operates to debar the workman from claiming the other. To proceed to obtain a decision on one of the alternative remedies offered to the workman would be a most undulatable expense of an option (b) but it does not follow that some less thorough course of action would not avail. The determination of whether the option has been exercised is one of those mixed questions of law and fact, instances of which are so

Cribb v. Kynoch.

(a) Per Cozens-Hardy, M.R., *Cribb v. Kynoch*, 161, [1908] 2 K.B. 551, *br.* at 559, *Page v. Barwell*, [1903] 2 K.B. 778, *Greenwood v. Greenwood*, 24 T.L.R. 24. In Scotland the other view has prevailed. *Quinn v. Falls Town*, 8 F. 855, *Little v. McFellon*, 2 F. 387.

(b) Cf. *Blackburn Corporation v. Sanderson*, [1902] 1 K.B. 794, where (a) other cases, *West Ham Local Board v. Muddahs*, 40 J.P. 470, and *Ham Local Board v. Rowell*, 1 K.B. 514, are distinguished; and *Smith v. Lowenfeld*, [1906] 2 Q.B. 278, is overruled.

abundant in jurisprudence. The decision of what can be an option is a question of law which the County Court judge will determine and on which, as the phrase is, "he will direct himself". There will then come the question whether the facts in the case before him can be brought within the terms of his definition, which must be drawn from the cases just passed in review. If the definition is rightly drawn, the judge's finding whether the particular case is within it or outside of it is final (supposing there is evidence before him for either view), but if he has added to or detracted from the elements that should be present in the legal notion of the exercise of an option his judgment will be reviewed. There is no doubt that in the interpretation of the exercise of an option, not only an unequivocal indication of the remedy the workman intends to take must be given, but that some steps—possibly involving "expense, trouble, and inconvenience" to the employer, must be taken to place the determination beyond mere surmise. Even this would not be conclusive, and the final solution would rest in the inferences to be drawn from the facts in each case. Some analogy may be found in the cases already noted. (a) Where a receipt in discharge of all liability has been given, the tendency of all the cases is not to hold the workman precluded where there are features of ambiguity in his action or in the facts.

To issue a writ in an action for negligence, or to enter a plaint under the Employers' Liability Act in the County Court, would *prima facie* be exercises of the option, yet they would not bind if they were not served on the respondents. But a less definite step than either of these would suffice if other matters concurred, involving reasonable expense and trouble on the respondents. In Scotland,

(a) *Ante*, 116; see too 404.

Chap. VII. receiving for about six months rather more than half wages, barring the first two weeks after injury, has been held exercise of the option. The Lord President treated it as raising solely a question of fact (*a*)

Powell v. Main Colliery Co.

Judging from the case of *Powell v. Main Colliery Co.*, (*b*) an option is plainly not exercised when the workman merely gives the notice of the accident; neither would it necessarily follow that he has made his election when he has made a claim for compensation which would be effectual under the Act if ultimately he so elected. The claim may be so worded as to indicate an election, though probably the Court would be slow to hold the applicant to the exact terms of a rudely drawn claim. But a claim for compensation in which the claim was the main feature, and which only incidentally glanced at the method of obtaining it, could scarcely be held conclusively binding. The commencement of legal proceedings may be too late, for the circumstances may point to the exercise of the option previously to them by proceedings by which the respondents may have been prejudiced; but generally this may be taken as *prima facie* indicating the exercise of the option or the claim for compensation under the Workmen's Compensation Act. A general claim for compensation would be indefinite and leave the final choice open.

Dictum of Holmes, L.J., in Beckley v. Scott considered.

In *Beckley v. Scott*, (*c*) Holmes, L.J., seems to be inaccurate where he says: "There is nothing in sub-sec. 4 to prevent the unsuccessful plaintiff from obtaining compensation by arbitration in accordance with the second schedule. It merely enables him if he shall so choose to have compensation assessed by the Court." It is contrary to *Edwards v. Godfrey*, (*d*) where Smith, L.J., says:

(a) *Mackay v. Rose*, [1906] S. C. 174

(b) [1900] A. C. 366

(c) [1902] 2 I. R. 504 at 506.

(d) [1870] 2 Q. B. 389 at 387.

"Having been defeated in this action, there would but for the provisions of sec. 1, sub-sec. 1, have been an end of any claim by the respondent against the appellant in respect of the injury", and also to Neale's case (a). It reads into the sub-section a remedy that is not found there, and it seems contradictory of the earlier passages of the L.J.'s judgment.

Nothing in the Workmen's Compensation Act 1906, is to affect any proceeding for a fine under the enactments relating to mines, factories, or workshops, or to the application of the fine, (b)

The enactments referred to are now codified by the Factory and Workshop Act, 1901, (c) by the Coal Mines Regulation Act, 1887, (d) and by the Metalliferous Mines Regulation Act, 1872, (e) and have been already referred to, (f)

CONTRACTING OUT OF THE ACT

The liability of the employer is not, however, absolute in the terms of the Act. He is allowed, with severe limitations under the stringent conditions of sec. 3, to contract himself out of his liability, or, more accurately perhaps, to vary the measure of his liability.

The method of doing this is through the instrumentality of the Registrar of Friendly Societies, an office created by the Friendly Societies Act, 1875, (g) and confirmed and extended by the Friendly Societies Act, 1896 (h)

(a) [1906] 2 K. B. 558 at 561, 567 and 568

(b) Sec. 1, sub-ss. 5. *Ante*, 301

(c) 1 Edw. VII. c. 22, ss. 136, 144

(d) 50 & 51 Vict. c. 38, ss. 59 (2), 70

(e) 35 & 36 Vict. c. 77, ss. 31, 38

(f) *Ante*, 225.

(g) 38 & 39 Vict. c. 50, ss. 10-11.

(h) 59 & 60 Vict. c. 26, ss. 1-7.

Chap VII. By his authority (a) regulations have been made and forms of application have been drawn up, providing for his obtaining all relevant information both for granting certificates under the new Act or of re-certifying schemes under the old Act. (b) But first he is bound "to take steps to ascertain the views of the employer and workmen," and then that any scheme of compensation, benefit or insurance for the workmen of an employer in any employment is not less favourable to the workmen and their dependants than the corresponding scales contained in this Act. If the scheme provides for contributions by the workmen it must confer benefits at least equivalent to such contributions, and the assent of a majority of the workmen to be ascertained by ballot is given to the scheme. It is not necessary that the scheme should be limited to the workmen of any particular employer, it may include many (c). When a certificate is granted by the Registrar, the employer may, till the certificate is revoked, contract with the workmen included in the scheme for the substitution of the provisions of the scheme for those of the Act, and the employer is to be liable only in accordance with the scheme.

**Requirements
of the Registrar
of Friendly
Societies.**

The Registrar of Friendly Societies, before certifying a scheme, requires, in addition to full particulars of the nature of the employment, the place where it is carried on, and the number of workmen engaged in it, and what number of them join with the employer in promoting the scheme—

- (1) A comparison of the provisions of the scheme with those of the Act,
- (2) A statement of the exceptional benefits the workman is to receive under the scheme.

(a) S. 8, sub-s. (8). *Ante*, 301

(b) S. 15 (2). *Ante*, 322. *See* Appendix B. *Post*, 864.

(c) S. 8 (1). *Ante*, 308.

- (3) A statement of the respective proposed contributions Chap VII.
of both employer and workmen
- (4) A declaration that the scheme contains no obligation on the workmen to join the scheme as a condition of their hiring.
- (5) An actuary's report upon the scheme (a)
- (6) Two printed copies.
- (7) A statutory declaration verifying the result of the ballot
- (8) A statement showing—
 - (a) the views of the general body of the workmen as to the scheme,
 - (b) how such views were ascertained.

According to the common law "a duty imposed by ^{common law} statute for the benefit of any particular person" may be ^{right} waived by the person intended to be benefited (b)

The maxim of law is, *Quod est conceditur potest etiam retractari* (c)

The common law right is taken away by the section. Taken away.
If the employer wishes to regulate his obligations to compensate his workpeople for injury arising out of and in the course of their employment he can only do so by obtaining a certificate from the Registrar of Friendly Societies approving a scheme in conformity to the requirements

(a) The forms of application for the certificate of the Registrar of Friendly Societies are set out in the Appendix. *Foot, 8-6*

(c) *Cutbush v. Bagley*, 1 Ex 151

(e) *Boydell v. Wood*, 2 M. & S. 21, per Bayley, J., at 25; or as the maxim appears in *Ord. 2, l. 39, Omne iudicium aduersus aequum pro se imbutum venit, non aduersus*. Lord Westbury points out in *Hunt v. Hunt*, 31 L. J. Ch. 161 at 175, that the *pro se* in the maxim show that "no man can renounce a right which his duty to the public, which the claims of society forbid the renunciation of." *Up. Wilson v. McIntosh*, [1894] A. C. 129 at 133. *Idem*, 294.

Workmen's Compensation Act, 1906

Chap. VII. just set out; and the Registrar is only empowered to grant the certificate on the conditions that the contract is—

- (1) Not less favourable to the workmen and their dependants than the corresponding scales contained in this Act
- (2) Not obligatory on the workman as a condition of the employment (a)
- (3) One that contains provisions enabling any workman to withdraw from the scheme.

In theory an employer has his common law right to refuse to employ a workman who will not come into the scheme; but an employer who is anxious about his scheme would do well to consider how, in the event of such action, he could face an application under sub-sec (1) to revoke the certificate on the ground that "the scheme is not being fairly administered or that satisfactory reasons exist for revoking" the certificate.

No direct liability
of employer
necessary

In *Priest v. Cochrane & Co.*, in the Dudley County Court, (b) Judge Roberts decided that under a scheme there need be no direct liability of the employer — i.e. the liability of an insurance society or a benefit society may be substituted. The scheme may be such that it is for the benefit of the workman to discharge the employer from all liability whatever, substituting the liability of an insurance or benefit society which has made a contract with the employer to which the workmen are not parties.

Haworth v.
Andrew Knowles
& Sons.

But the terms of the scheme must be narrowly regarded, and if in any particular it is not applicable to the workman's case he is restored to his common law rights. As in *Haworth v. Andrew Knowles & Sons, Ltd.*, (c) where the

(a) *Ib.* See 3 (3). *Ante*, 303. (b) 7th April, 1902, but unreported.
(c) 19 T. L. R. 658.

committee of management of a scheme having stopped a workman's disablement allowance on the ground that he was fit to work and failed to go to work when able to do so. The workman brought an action for arrears, and the Court of Appeal held that on a true interpretation of the rules under the scheme the decision of the committee was not conclusive and final, and the workman had his remedy in the Courts. •

Chap VII.

In the event of the scheme becoming insolvent the liability of the employer would not revive, so long as the certificate continues unrevoked. ^{Scheme insolvent.}

Any existing contract by which a workman relinquishes his right to compensation from the employer for personal injury arising out of and in the course of his employment shall not, for the purposes of the Act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given on the 1st July, 1907. Contracts substituting the provisions of a scheme certified under the Workmen's Compensation Act, 1897, are excepted from this provision, but if any such scheme is not recertified before six months from the 1st July, 1907, the certificate thereof shall be revoked. (a)

Where an infant is a workman within the scheme, it has been decided that the general law remains applicable; he will not be bound unless acceptance of the scheme is for his advantage. (b) If the point ever arises the Courts will probably on this section express inability to go behind the certificate of the Chief Registrar; for upon his certificate being given, and while it remains in force, the employer

(a) *Infra*, 322. Wallace v. R. & W. Hawthorne, Leslie & Co., Ltd., 45 Sc. L. R. 547.

(b) Stephens v. Dudbridge Iron Works Co., [1901] 2 K. B. 225.

Chap VII. has statutory authority "to contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of the Act," and that the proper statutory authority has certified that the scheme is for his benefit, and from this there is no appeal. The *Dudbridge* case has no bearing. No one there, official or other, had certified that the exercise of the option was for the infant's benefit. Under this clause all workmen are treated as infants, and a special department has to see that they enter on no contract, but that which is for their benefit.

The right to contract out of rights given by the common law or by the Employers Liability Act, 1880, and any contracts entered into with reference to these rights, are unaffected. The limitation of freedom of contract extends only to rights given by the Workmen's Compensation Act, 1906.

Form of
Registrar's
certificate

A point has been raised that the Registrar of Friendly Societies must certify the scheme in his own name. This is plainly not so, as may be seen by referring to the forms in the Second Schedule to the Friendly Societies Act, 1896. (a)

The objection has, then, been altered to one that when the Registrar signs, as frequently in practice he does, the signature must be his full and genuine signature and not by initials. This contention, though not finally negatived in any case, in so many words is still equally baseless with the others. (b)

(a) 59 & 60 Vict. c. 25.

(b) *Benjamin on Sigs.* (2nd ed.), 190. "There seems to be no doubt that if the initials are intended as a signature by the party who writes them, this will suffice." per Lord Westbury, *Caton v. Caton*, 12 B. 2, H. of L. 125, 143. Cf. *The Queen v. Justices of Kent*, L. R. 8, Q. B. 305, *In re Whitley Partners, Ltd.*, 34 Ch. D. 387, as to the validity of a signature authorized to be made by an agent; as to a printed name *Schneider v. Morris*, 2 M. & S. 286, per Lord Ellenborough, C.J., at 289, *Wilks, Sale of Goods*, 113, for the Scotch law, see *Reid v. Baxter*, 7 Cl. & F. 261.

The certificate may be given for a limited period, but **Chap. VII.** for not less than five years, and may from time to time be renewed either with or without modifications (a) Though ^{Duration of certificate,} the scheme is certified for a longer period, it may be terminated before that period is arrived. The workmen, or any one on their behalf, may complain to the Registrar of Friendly Societies that the benefits of the scheme—

- (1) no longer conform to the conditions of sub-sec. 1 of sec. 3 of the Act; or
- (2) are being violated; or
- (3) are not being fairly administered; or
- (4) that satisfactory reasons exist for revoking the certificate.

This is an amendment of the Act of 1897 under which, ^{Renewal scheme; 74.} where the original scheme had come to an end and the workmen had gone on working with a "renewal scheme" in operation to which he had not signified his assent and was injured, it was held that the *onus* was on the employer to show that the workman had agreed to accept the renewal scheme and failing proof of this, that his rights under the Act remained (b). There was besides evidence that knowledge of his dissent had been brought to the notice of the employer. The case is of no particular importance since it was decided on its particular facts, and no inference as to *onus* can be drawn from it. The claim of the plaintiff was admitted subject to a special defence. This the Court held was not proved. The rule of *onus* is: the *onus* rests ^{Rule of onus; 74.} before evidence is gone into upon the party asserting the affirmative; and it rests after evidence is gone into upon

(a) S. 3, sub-s. (2). *Ibid.*, 303

(b) *Wilson v. Ocean Coal Co., Ltd.*, 21 T. L. R. 195, 621.

Chap. VII. the party against whom judgment would go if no further evidence is given.

Treharne v. Ocean Coal Co.

In the case of *Treharne v. Ocean Coal Co.*, in which judgment was delivered in the Court of Appeal at the same time as the judgment in *Wilson's case* (the facts in each case are identical), Collins, M.R., summarized the conclusion of the County Court judge, from whom the appeal came: "That the workman, having assented to the original scheme, was bound by the subsequent scheme so as to throw on him the *onus* of giving notice to his employers if he objected to it." This the M.R. thought was wrong.

The Act of 1906 provides for renewal schemes, which the previous Act does not. Every scheme in force at the commencement of this Act shall if recertified by the Registrar of Friendly Societies have effect as if it were a scheme under this Act. (a)

The Registrar shall recertify any such scheme if it is proved to his satisfaction that the scheme conforms or has been so modified as to conform with the provisions of this Act as to schemes. (b) Any such scheme not recertified before the expiration of six months from the commencement of the Act is revoked. (c) It is difficult to suppose that a workman would be more bound by a renewal scheme to which he had not assented than to work under the terms of an expired scheme.

The Registrar shall examine into any complaint, and if satisfied that good cause exists for such complaint shall, unless the cause of complaint is removed, revoke the certificate. (d) When the certificate is revoked or expires, any moneys or securities held for the purposes of the

(a) S. 15 (2). *Ante*, 323

(b) *Ib* (3). *Ante*, 323.

(c) *Ib* (4)

(d) S. 8 (1). *Ante*, 301

scheme shall be distributed as arranged, between the employer and the workmen, or in the event of disagreement as may be determined by the Registrar of Friendly Societies. (a) The employer has to furnish all accounts and answer inquiries in regard to the scheme as may be made or required by the Registrar of Friendly Societies. (b)

Where a scheme that has been certified provides for payment of compensation by a Friendly Society, the provisions of the proviso to sec. 8, sub-sec. (1) of sec. 16 and of sec. 11 of the Friendly Societies, 1896, (c) shall not apply to such society in respect of such scheme (d)

The provisions referred to are as follows:—

Sec. 8 (1).—Provided that a friendly society which contracts with any person for the assurance of an annuity exceeding £50 per annum, or of a gross sum exceeding £200, shall not be registered under this Act.

Sec. 16.—A society assuring a certain annuity shall not be entitled to registry, unless the tables of contributions for the assurance, certified by the actuary to the National Debt Commissioners, or by some actuary approved by the Treasury, who has exercised the profession of an actuary for at least five years, are sent to the Registrar with the application for registry.

Sec. 11 (1).—A member, or person claiming through a member, of a registered friendly society or branch, shall not be entitled to more than £200 by way of gross sum, together with any bonuses or additions declared upon assurances not exceeding that amount, or (except as provided by this Act) £50 a year by way of annuity, from any one or more of such societies or branches.

(a) S. 3 (5). *Ante*, 304

(c) 59 & 60 Vict. c. 25.

(b) S. 3 (6). *Ante*, 301

(d) First Schedule (21). *Ante*, 38..

Chap. VII. (2) Any such society or branch may require a member, or person claiming through a member, to make and sign a statutory declaration that the total amount to which that member or person is entitled from one or more such societies or branches does not exceed the sums aforesaid.

The exclusion of these enactments is necessary, as payments under the Workmen's Compensation Act may amount to £1 per week or in case of death to £300.

The Chief Registrar is to include in his annual report the particulars of the proceedings of the Registrar under the Act.^(a)

Taylor v Hamstead Colliery Co., and Williams v. Vauxhall Colliery Co., considered

In *Taylor v. Hamstead Colliery Co.*,^(b) the Court of Appeal decided that where a workman had assented to a scheme under the section we are considering, such "assent is binding on his representatives, and has placed them in the same position as if they were claiming compensation under the Act." It has been suggested that this is in conflict with *Williams v. Vauxhall Colliery Co., Ltd.*,^(c) where Cozens-Hardy, M.R., held that "under this Act the dependants have a separate and independent right . . . a right which the workman cannot deprive them of except in this sense, that the Act contemplates that the employer is not from first to last bound to pay more than the maximum compensation given by the Act, and is entitled to take credit for any sums advanced by way of weekly payments." An examination of the facts will show there is no conflict. In the latter case the injured workman did not come to the Court for compensation, but made an arrangement under which he received half his weekly earnings while he was laid up; he subsequently got back to work, but to different and more highly paid work than

(a) S. 3, sub-a. (7) *Ante*, 301. (b) [1903] 1 K. B. 838.

(c) [1907] 2 K. B. 493.

before his accident, from the effects of which ultimately he died. Nothing had been said about further compensation. The widow claimed under the Act. The employers set up against her claim "an implied release by the workman of his right to further compensation." It was to these facts then that *Coxens-Hardy, M.R.*'s expressions are to be applied. In Taylor's case the workman had come into a scheme under sec. 3 which requires the provision of "scales of compensation not less favourable to the workmen and their dependants than the corresponding scales contained in this Act." (a)

The Workmen's Compensation Act applies to any employment under the Crown to which the Act would apply if the employer were a private person. The Act of 1906, however, specially exempts employment in the naval or military services. (b)

In the case of employment in the private service of the Crown the head of the department or the Royal Household in which the injured workman is employed at the time of the accident is to be deemed to be the employer.

The Treasury may, by warrant laid before Parliament, modify for the purposes of the Workmen's Compensation Act, 1906, the warrant made under sec. 1 of the Superannuation Act, 1887.

They may also frame a scheme with the view of its being certified by the Registrar of Friendly Societies under sec. 3 of the Workmen's Compensation Act, 1906. (c)

This seems a fitting place to compare the merits of the various methods of compensation open to workmen at law.

Comparison of advantages under different ways of obtaining compensation.

(a) The decision was under the Act of 1897. The quotation is from the Act of 1906, which, for this purpose, is identical.

(b) S. 9 (1). *Ante*, 316.

(c) S. 9 (2). *Ante*, 317

Chap. VII. If the claim can be made at common law this is in every way the most advantageous method; for the damages recoverable are unlimited, payment in the case of an adult is made in a lump sum at his unlimited disposal, and the costs are regulated by the general law.

**Comparative
advantages of
claims
Common Law.**

**Employers'
Liability.**

With the Employers Liability Act the matter is more complicated. The damages here recoverable are limited to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in a like employment to that in which the injured person is engaged at the time he is injured. Thus, if a man earning £1 a week is killed, his relatives can recover under this Act £156, which is precisely the amount they can recover under the Workmen's Compensation Act. But if the same man receives a comparatively trivial injury, incapacitating him for three months, under the Employers Liability Act, the jury may, in theory, award him the full sum of £156, while the utmost he could obtain under the Workmen's Compensation Acts would be 10s. a week for the three months.

**Workmen's
Compensation**

Summary.

From this it appears that there is no decided balance as an absolute rule determining whether proceedings should be taken either under the Employers Liability Act or the Workmen's Compensation Acts. The particular circumstances must in each case be looked to. The general considerations applicable may be summarized as follows:—

- (1) Where there is common law negligence the common law remedy had better be pursued. There is always an opportunity, in the event of any technical failure, of resorting to the procedure of sec. 1, sub-sec. 4 of the Workmen's Compensation Act, 1906, if the action is brought within ~~three~~ **three** months.

- (2) In the case of an injury not likely to have protracted consequences, both the remedy at common law and under the Employers Liability Act present opportunities of obtaining more substantial compensation than can be awarded under the Workmen's Compensation Act. Chap VII.
- (3) If the injury is a fatal one and there is no liability at common law, and the deceased man's wages are less than £1 a week, the procedure under the Workmen's Compensation Act is more advantageous than that under the Employers Liability Act.
- (4) If the injury is a fatal one and there is no liability in respect of it at common law, and more wages than £2 a week were being earned by the deceased, the most advantageous procedure is under the Employers Liability Act.
- (5) If the injury is a serious one, but one that will probably not be accompanied by prolonged disability or infirmity, the lump sum of three years' wages under the Employers Liability Act is more advantageous for the injured man than the maximum weekly payment of £1, which is, moreover, liable to review.
- (6) If the injury is permanent, the injured man's life a good one, and his wages large, the compensation (which may amount to £1 a week for life) under the Workmen's Compensation Act offers the greatest advantages.
- (7) If the workman is under twenty-one years of age, and the injury produces total incapacity, and his wages are small (under £1 a week), the Workmen's Compensation Act is best to go under as he may obtain 10s. a week during incapacity.

CHAPTER VIII

Chap. VIII.

WORKMEN AND EMPLOYER

THE last chapter has been occupied with considering the nature and extent of the liability imposed by the legislation which has culminated in the Workmen's Compensation Act, 1906.

We are now to consider who are workmen and who employers (*a*) within the meaning of it; for by these names are signified those who are to profit and those who are to pay by virtue of its provisions.

WORKMEN (*b*)

The Act of 1906 has thrown upon the benefits of the principle legislation to all classes of labour in place of the restriction to the workers in selected and specially dangerous occupations, which was the note of the Act of 1897. A new definition of workman is therefore become necessary, and this is by no means the least noteworthy portion of the new Act. The words of this definition will be found in the copy of the Act, (*c*) which is worded in a manner more than usually embarrassing. Here an endeavour will be made to break up the section so as more conveniently to elicit its meaning.

(*a*) S. 1 (1).

(*b*) By S. 1 (1) of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), words importing the masculine gender shall include females.

(*c*) S. 13. *Ante*, 319.

B.E.L.

Chap VIII. We eliminate from the possibility of being regarded as a workman under the Act —

- (A) Any person (1) who is employed in any other way than by way of manual labour, and
- (2) whose remuneration exceeds £250 a year
- (B) Any person (1) who is employed in a "casual manner," and
- (2) who is employed otherwise than for the purposes of the employer's trade or business
- (C) A member of a police force.
- (D) An outworker.
- (E) A member of an employer's family dwelling in his house

Having excepted all persons coming within these five classes, the definition of workman is "any person who has entered into or works under a contract of service or apprenticeship with an employer." Then the Act adds, more possibly, to clarify and emphasize the intention than from any emoting force in the words, "whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, is oral or in writing."

The intention to include, amongst workmen, persons employed under a contract of service for work which is not manual work, and those doing clerical work is thus unmistakably affirmatively indicated as it is negatively by the exclusion of those from the benefits of the Act by the exception of class (A) of those "whose remuneration exceeds two hundred and fifty pounds a year." What effect the words "or otherwise" have in this connection is not clear.

In *Monek v. Hilton* (a) Pollock, B., in interpreting this

(a) 2 Ex. D. 268; 16 L. J. M. C. 163, 169.

phrase, says "We must read the statute as if it had used the words . . . or other act of the like kind." The principle upon which this rule is founded is the long-established, and the only difficulty which arises is in the mode and extent of its application to the provision in question. (a) We must have regard to the established rule *Verba generalia restringuntur ad habilitatem rei vel personæ*, which Lord Bacon translates, "For all words, whether they be in deeds or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter or person." (b)

Chap VIII

Under the Act of 1897, in *Simpson v. Ebbw Vale Steel, Iron & Coal Co.*, the Court of Appeal held that the words served to extend the limited meaning that would otherwise be put on the word "Workmen," for whom the benefits of the Act were intended beyond the class of those who laboured with their hands, so that it should include "the classes whose remuneration can properly be described as wages." "We must interpret the Act as applying to persons whom *ex hypothesi* the Legislature regards as not being in a position to protect themselves." Bagnall v. Inyestment (b) reiterated the principle of *Simpson's* case, that in determining who is a workman the popular meaning has to be given to the term. But that was because in the Act of 1897 there was no definition. The presence of the definition in the Act of

Simpson v. Ebbw Vale Steel, Iron & Coal Co.

Bagnall v. Inyestment.

(a) See, however, *Leather v. Merrett*, 1 L. R. 100 (per Saltonstall, J., at 170, and *Sutton v. T. & A. D. B. Co.*, 12 F. T. R. 128, per Lord Russell, C.J., 129. *MacDermott v. Macleod*, 2 F. T. R. 7, per the Lord President, at p. 1029, *McCleod v. Macleod*, 1 F. T. R. 10, "or otherwise" says Lord Russell, "are words no doubt very comprehensive, but they appear to embrace not only different degrees or characters of service, not different kinds."

(b) *Max Reg. 10*. See per Grove, J., *Gordon v. Jennings*, 9 12 B. D. at 16, *Lyden v. Stodd*, 2 F. T. R. 159 at 167.

(c) [1905] 1 K. B. 453.

(d) [1907] 1 K. B. 631.

Chap VIII. 1906 has the effect of extending the benefits of the Act to "any person who has entered into or works under a contract of service." The applicant in Bagnall's case would be clearly within this; and on the assumption that his work was manual labour he would be within the Act of 1906; while on the assumption that his work was not manual labour, he would be within the benefits of the Act till the fifth year of his term; but after that, on the increase of the salary to £260 per annum, he would be outside it.

Simpson v. Ebbw Vale Steel, Iron, & Coal Co. considered

Next we come to consider Simpson's case, (a) the case of a certificated manager of a coal mine who is paid a yearly salary, and is not required to engage in manual labour. Had he been engaged in manual labour the Act would apply, though it is "the case of a man who is paid a salary of £100 a year and has a house rent free, and who might be paid treble as much." (b) But since the case is not one of manual labour, the limitation of Class (A) takes effect. The remuneration is more than £250 a year, and the result of Simpson's case would not be affected by the Act of 1906. The question remains, which was asked by Collins, M.R., in Simpson's case (c) Can it be supposed that the legislature intended the compensation under the Act to be payable in the case of "a man who might be earning thousands a year" compensation which in the case of temporary incapacity is not to exceed twenty shillings a week? Certainly not; but then the way of escape is that though the work he is doing might by an abuse of language be called manual labour, the force which gives it effect is the power of education, calculation, or genius.

We are now to fix, so far as we can, the limits of the phrase "contract of service." (d)

(a) [1906] 1 K. B. 453.

(b) Per Collins, M.R., *l.c.* 458.

(c) *L.c.* 458.

(d) *Ante*, 288.

In order to constitute a contract of service there must **Chap. VIII.**
be either an express or an implied mutual agreement
binding one party to employ and remunerate, and the other
to serve for some determinate term or period, but wherever
there is a contract for hiring or employment on the one
part, and service for wages or salary on the other, for a
specified time, there is an engagement on the part of the
employer to keep the employed in the relation in question
during that time, and not merely to pay him the wages for
the services at the end, and in none of these cases does
the obligation to keep retained and employed necessarily
imply an obligation on the part of the master to supply
work (a)

But it often happens that contracts are made between ^{Partner not a} persons engaged in business and their subordinates that ^{servant.}
instead of salary they are to be remunerated by percentages
or a share of the profits of the business. Rule 131 of sec. 2
of the Partnership Act, 1890, (b) provides that the receipt
by a person of a share of the profits of a business is *prima*
facie evidence that he is a partner in the business; but the
receipt of such a share, or of a payment contingent on or
varying with the profits of a business, does not of itself
make him a partner in the business, and in particular a
contract for the remuneration of a servant or agent of a
person engaged in a business by a share of the profits of the
business does not of itself make the servant or agent a
partner in the business or liable as such. But where the
position of the workman is that of partner he is thereby
excluded from the benefit of the Act. (c) "When one
comes to analyse an arrangement of this kind, namely, one
y which a partner himself works, and receives sums which

(a) Per Crompton, J., *Emmens v. Elderton*, 4 H. L. C. 621 at 644

(b) 51 & 54 Viet. c. 39

(c) *Ellis v. Joseph Ellis & Co.*, [1905] 1 K. B. 824, 828.

Chap VIII. are called wages, it really does not create the relation of employers and employed, but is in truth a mode of adjusting the amount that must be taken to have been contributed to the partnership assets, by a partner who has made what is really a contribution in kind, and does not affect his relation to the other partners, which is that of co-adventurer and not of employee."

Vamplow v
Parkgate Iron
& Steel Co

Again, "where a man undertakes to do work as a contractor, that *prima facie* at any rate negatives the existence of the relation of employer and employed, and shows that the contract is not one of employment within the meaning of this Act," *i.e.* the Act of 1897, (a) he has not entered into a contract of service with an employer.

Simmons v
Faulds

The Court of Appeal seem to have followed Simmons v Faulds in arriving at their decision (b). There a foreman bricklayer contracted to do a piece of work for a fixed sum, supplying the labour and tools, but not the machinery. He worked at the job and drew 75 per cent of the price for the work he had done; nevertheless he was outside the Act, and held to be not a workman but a contractor. In arguing

Evans v. Pen-
wyll Dinas
Brick Co.

Vamplow's case it was urged that Evans v. Penwyll Dinas Silica Brick Co. (c) had been overlooked. A quarryman was employed under a written agreement providing for payment for every ton of material worked. His tools were found; but he hired the men who worked under him for him, and could discharge them. Having doubt as to whether he came under the Workmen's Compensation Act or not, he gave notice to terminate his employment, which he resumed on an assurance that he would be entitled to

(a) Vamplow v Parkgate Iron & Steel Co., 1903, 1 K. B. 451. For the rest of who is a contractor, see *ant.*, 139.

(b) 17 T. L. R. 352.

(c) 18 T. L. R. 68.

compensation if he were injured. Injury having been sustained by him, and an application made under the Act, the County Court judge found that applicant was a "workman." The Court of Appeal affirmed the County Court judge; as it was difficult to distinguish the man's position from that of an ordinary labourer at piece work, (to) and, moreover, he was induced to resume working by the assurance that in the event of accident he would be entitled to compensation. Thus, said Mathew, L.J., in *Vannipley's* case, was the differentia from *Simmons's* case; for the ground of the decision in *Evans's* case was "the special agreement come to that the applicant should be treated as a workman within the meaning of the Workmen's Compensation Act, 1897." (b)

Fitzpatrick v. Evans & Co. (c) is not a decision under the Workmen's Compensation Act. Colliery owners entered into an agreement with a contractor to sink and wall a shaft. On entering on the work he signed the "record book," binding him to observance of the regulations for the safety of the mine. The Court of Appeal held that this did not create a contract of service between him and the colliery owners. "It is a question of fact whether the relation of employer and employed had been established . . . but, as in the case of other questions of fact there must be some reasonable evidence to go to the jury on the question." "I do not think that the evidence of Morris to the effect

Fitzpatrick v. Evans.

(a) *Cy Soller v. Heddock*, 1 K B 570, *Paton v. Lockhart*, 7 F 451.

(b) The Scotch cases are quite in accord. *McGregor v. Dansken*, 1 F. 536; *Douglas v. McGready*, 2 F. 1027, and *Hadden v. Dick*, 5 F. 150, where the Lord Justice Clerk said: "There was no obligation on the deceased to do work with his own hands." "There was no arrangement for the work being done in any particular way, or at any particular time, and the deceased could and did carry on the work as he and his partner chose. The quarry master could not have dismissed him as a servant. If any question arose, it could only be dealt with as a question of breach of contract, and not as a breach of a contract of service."

(c) [1902] 1 K B 505.

Chap. VIII. that if the certified manager of the mine had given him an order relating to the work he would have obeyed it and would have expected his own workmen to do so, constituted any evidence that the relation of employer and employed existed between these workmen and the Colliery owners" (a)

Employment of pauper.

The employment of a pauper under the scheme of the Poor Laws is not within the Workmen's Compensation Act. The first objection to his inclusion is that he has neither entered into nor worked under a contract of service or apprenticeship. Then if he is killed he can leave no dependants. If he is injured, he has no weekly earnings, and there is no difference between the amount of his average weekly earnings [nil] before the accident and the average weekly amount he is earning or able to earn after the accident, or if he is able to earn wages after, he has gained, not lost by the accident.

What the pauper's position is at common law or under the Employers Liability Act is a different question where the difficulty is not the right of action but whom to sue (b)

Curate.

There is the authority of the chancellor of a northern diocese that a curate is within the Workmen's Compensation Act. This eminent person seems to have spoken unadvisedly, for in view of the complicated provisions of 1 & 2 Vict. c. 106, the incumbent (rector or vicar) could hardly be termed an "employer," nor the curate a person who has entered into a contract of service. The presence of an element or two which go to create the relationship is

(a) *Per Collins*, M.R., 14 C. 510. In *Squire v. Maland Lane Co.*, [1905] 2 K. B. 448, the fact that lace "chippers" were not bound personally to work in performance of their contract was held to exclude them from the definition of workmen (c. 10) of the Employers and Workmen's Act, 1875. The words there are "a contract of service or a contract personally to execute any work or labour."

(b) See *Toxeland v. West Ham Union*, [1907] 1 K. B. 920, but as to work under 5 Edw. VII. c. 18 see *Porton v. The Central Unemployed Body*, for London, *Times* newspaper, 28th Nov., 1908.

not sufficient to constitute it where there are present other **Chap. VIII.**
 elements quite incongruous. The incumbent cannot
 dismiss his curate nor the curate depart without the con-
 sent of the bishop, nor without this consent is there any
 coercive power, while from the order of the incumbent there
 is an appeal to the bishop. The relation is one *in generis*,
 and with no affinities other than verbal and merely*
 superficial, with the relationship between one who enters
 into a contract of service with an employer and that
 employer. *Qui vult ecclesiam habere in curato (a)*

Neither is a parish clerk a workman, for his is *parochial* **Parish clerk.**
force a freehold office^(b), and though he be nominated by
 the parson, when he is in he becomes not the parson's clerk,
 but the clerk of the parish, who, therefore cannot turn him
 out at pleasure, *et c.* This seems to be the test with regard
 to other ecclesiastical offices. If there is a life estate in the
 office, the life tenant is not a workman. If he works under
 a contract he is. Difficulties often arise on the point
 —between whom is the contract, the officer, and the incum-
 bent, or the churchwardens, or the vestry, or all or some
 or any. The head master of a grammar school was not **schoolmaster.**
 a workman within the Act *et c.* for usually he worked
 under a scheme of the Charity Commission or the Board of
 Education, by which the governing body may not interfere
 with his acts in the management of the school, and there was
 no contract of service under an employer. The assistant
 masters of a grammar school were probably workmen. Their
 contract, however, was with the head master (c). They had
 no remedy against the Board of Governors, probably they
 had against the head master, and the governors were

(a) *Exton v. Stodd*, 2 Plevd. 171 at 167.

(b) *Box v. Ashton Saver*, 159. *Rex v. Sterling Sayer*, 171.

(c) *Per Holt, J.*, *Van Abndg. Parish Clerk*, 541.

(d) *Cy. Wright v. Zeland (Marquis)*, [1908] 1 K. B. 63.

Chap. VIII. bound to indemnify him from a statutory liability imposed in respect of his school. But now (a) any master in an endowed school by whomsoever appointed shall be deemed to be in the employment of the governing body for the time being of the school. By the interpretation section "master" includes the head master.

The assistants in a village school have their remedy against the committee or the incumbent, or such person by whom they are appointed, and the head teacher also. The contracts of local education authorities are probably generally made directly with the teacher, even to the junior pupil teacher, and the head teacher stands to them merely as foreman or manager.

Church choir.

Choir members of a church choir are probably within the Act, but the terms of their appointment must be looked to, and their employer would probably not be the choir master but his. An organist would not be within the Act if the considerations before noted are valid. His work is not a contract of service where the employer may direct and control, but a contract for the display of skill or talent which no more admits of it than the exercise of the manual skill of the surgeon or the dexterity of the harnesser; he is concerned with results, and the master does not prescribe the means by which they are attained. (b) The organ blower is a baser employment.

Organist.

SEAMEN.

Masters, seamen, and apprentices to the sea service, and apprentices in the sea fishing service are workmen, (c) if—

(1) They have entered into or work under a contract of service or apprenticeship with an employer; and

(a) The Endowed Schools (Masters) Act, 1908, s. 1 (4), VII. c. 34, s. 1.

(b) See per Bramwell, J.J., Evidence before Committee on Employers Liability, Parliamentary Reports, Committee's Papers, 1877, vol. iii, 53. Having "a right to say to the employer, 'I agree to do it, but I shall do it after my own fashion, I shall begin the wall at this end, and not at the other', there the relation of master and man does not exist."

(c) s. 7 (1). As to apprentices, see Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), s. 49 (2).

- (2) They are members of the crew of any ship registered in the United Kingdom,^(a) or of any other British ship^(b) of which the owner^(c) or the managing owner or manager^(d) resides, or has his principal place of business, in the United Kingdom. Chap. VIII.

There are certain modifications in regard to the proceedings under the Act by seamen, the consideration of which we shall defer till we deal with the procedure of the Act generally. (c)

If a workman who is not a seaman is on board a ship and is injured he is not prevented from recovering because he is not named in this section; for there seems no reason, as was said in the Irish case of *O'Hanlon v. Dandall, etc., Steam Packet Co., (7)* "to suppose because the accident happened in or upon a ship that therefore it is to be excluded from the operation of the Act of Parliament." Thus the "painters who go on board to paint the ship, or stowaways who go there to stow or trim cargo," though not seamen^(e) are entitled to the benefit of the Act as workmen, and so are the cattlemen employed by the cargo owners to load a deck cargo of cattle, who though "they were not part of the crew at all" would yet be "the servants of the cargo owners." (4)

By the definition clause "ship," "vessel," "seaman" Definitions.

(a) 57 & 58 Vict. c. 60, s. 2, 3.

(b) 57 & 58 Vict. c. 60, s. 3.

(c) 57 & 58 Vict. c. 60, ss. 502-4, extended by 6 Edw. VII c. 43, s. 71, "to include any charter to whom the ship is demised."

(d) 6 Edw. VII c. 68, s. 13. "Manager" in relation to a ship means the ship's broker, or other person to whom the management of the ship is entrusted by, or on behalf of the owner.

(e) *Perd, 607.*

(f) 33 Ir. L. T. R. 36.

(g) *Cobett v. Pearce*, [1904] 2 K. B. 422, per Lord Alverstone, C. J., 426.

(h) *Anglo-Argentine Live Stock and Produce Agency v. Temperley Shipping Co.*, 1899; 2 Q. B. 408, per Bigham, J., at 412.

Chap. VIII. and "part" have the same meanings as the Merchant Shipping Act, 1891. (c) This refers to sec. 712, where we find "ship" "includes every description of vessel used in navigation, *but not propelled by oars*;" (d) "Vessel" "includes any ship or boat or any other description of vessel used in navigation;" "Seamen" "includes every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship;" (e) "Part" "includes place;" (f)

These definitions do not exclude the ordinary meanings attached to the terms they define, they add to them any additional meaning they may express.

Exemption. The Act specially excludes "such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessels" (*14*). Were this not provided for by enactment it would result from the decision in *Ellis v. Joseph Ellis & Co.* There is a decision on the section in Scotland. The sole remuneration of the mate of a steam trawler was one and one eighth share of the net balance of the gross price of the fish caught on a trip, after deducting certain specified charges, not including the remuneration of the other members of the crew, who were paid

$$f_0) \approx 1:1 \text{ (} f_0, 391$$

for a large household and for a large number of persons, had a milk house, a coal-burned boiler, a cold-water supply, and a coal on the premises. Mayor of Southport, Maine, 1883; 1890; 1891; 1892; 1893; 1894; 1895; 1896; 1897; 1898; 1899; 1900; 1901; 1902; 1903; 1904; 1905; 1906; 1907; 1908; 1909; 1910; 1911; 1912; 1913; 1914; 1915; 1916; 1917; 1918; 1919; 1920; 1921; 1922; 1923; 1924; 1925; 1926; 1927; 1928; 1929; 1930; 1931; 1932; 1933; 1934; 1935; 1936; 1937; 1938; 1939; 1940; 1941; 1942; 1943; 1944; 1945; 1946; 1947; 1948; 1949; 1950; 1951; 1952; 1953; 1954; 1955; 1956; 1957; 1958; 1959; 1960; 1961; 1962; 1963; 1964; 1965; 1966; 1967; 1968; 1969; 1970; 1971; 1972; 1973; 1974; 1975; 1976; 1977; 1978; 1979; 1980; 1981; 1982; 1983; 1984; 1985; 1986; 1987; 1988; 1989; 1990; 1991; 1992; 1993; 1994; 1995; 1996; 1997; 1998; 1999; 2000; 2001; 2002; 2003; 2004; 2005; 2006; 2007; 2008; 2009; 2010; 2011; 2012; 2013; 2014; 2015; 2016; 2017; 2018; 2019; 2020; 2021; 2022; 2023; 2024; 2025; 2026; 2027; 2028; 2029; 2030; 2031; 2032; 2033; 2034; 2035; 2036; 2037; 2038; 2039; 2040; 2041; 2042; 2043; 2044; 2045; 2046; 2047; 2048; 2049; 2050; 2051; 2052; 2053; 2054; 2055; 2056; 2057; 2058; 2059; 2060; 2061; 2062; 2063; 2064; 2065; 2066; 2067; 2068; 2069; 2070; 2071; 2072; 2073; 2074; 2075; 2076; 2077; 2078; 2079; 2080; 2081; 2082; 2083; 2084; 2085; 2086; 2087; 2088; 2089; 2090; 2091; 2092; 2093; 2094; 2095; 2096; 2097; 2098; 2099; 2100; 2101; 2102; 2103; 2104; 2105; 2106; 2107; 2108; 2109; 2110; 2111; 2112; 2113; 2114; 2115; 2116; 2117; 2118; 2119; 2120; 2121; 2122; 2123; 2124; 2125; 2126; 2127; 2128; 2129; 2130; 2131; 2132; 2133; 2134; 2135; 2136; 2137; 2138; 2139; 2140; 2141; 2142; 2143; 2144; 2145; 2146; 2147; 2148; 2149; 2150; 2151; 2152; 2153; 2154; 2155; 2156; 2157; 2158; 2159; 2160; 2161; 2162; 2163; 2164; 2165; 2166; 2167; 2168; 2169; 2170; 2171; 2172; 2173; 2174; 2175; 2176; 2177; 2178; 2179; 2180; 2181; 2182; 2183; 2184; 2185; 2186; 2187; 2188; 2189; 2190; 2191; 2192; 2193; 2194; 2195; 2196; 2197; 2198; 2199; 2200; 2201; 2202; 2203; 2204; 2205; 2206; 2207; 2208; 2209; 2210; 2211; 2212; 2213; 2214; 2215; 2216; 2217; 2218; 2219; 2220; 2221; 2222; 2223; 2224; 2225; 2226; 2227; 2228; 2229; 2230; 2231; 2232; 2233; 2234; 2235; 2236; 2237; 2238; 2239; 2240; 2241; 2242; 2243; 2244; 2245; 2246; 2247; 2248; 2249; 2250; 2251; 2252; 2253; 2254; 2255; 2256; 2257; 2258; 2259; 2260; 2261; 2262; 2263; 2264; 2265; 2266; 2267; 2268; 2269; 2270; 2271; 2272; 2273; 2274; 2275; 2276; 2277; 2278; 2279; 2280; 2281; 2282; 2283; 2284; 2285; 2286; 2287; 2288; 2289; 2290; 2291; 2292; 2293; 2294; 2295; 2296; 2297; 2298; 2299; 2300; 2301; 2302; 2303; 2304; 2305; 2306; 2307; 2308; 2309; 2310; 2311; 2312; 2313; 2314; 2315; 2316; 2317; 2318; 2319; 2320; 2321; 2322; 2323; 2324; 2325; 2326; 2327; 2328; 2329; 2330; 2331; 2332; 2333; 2334; 2335; 2336; 2337; 2338; 2339; 2340; 2341; 2342; 2343; 2344; 2345; 2346; 2347; 2348; 2349; 2350; 2351; 2352; 2353; 2354; 2355; 2356; 2357; 2358; 2359; 2360; 2361; 2362; 2363; 2364; 2365; 2366; 2367; 2368; 2369; 2370; 2371; 2372; 2373; 2374; 2375; 2376; 2377; 2378; 2379; 2380; 2381; 2382; 2383; 2384; 2385; 2386; 2387; 2388; 2389; 2390; 2391; 2392; 2393; 2394; 2395; 2396; 2397; 2398; 2399; 2400; 2401; 2402; 2403; 2404; 2405; 2406; 2407; 2408; 2409; 2410; 2411; 2412; 2413; 2414; 2415; 2416; 2417; 2418; 2419; 2420; 2421; 2422; 2423; 2424; 2425; 2426; 2427; 2428; 2429; 2430; 2431; 2432; 2433; 2434; 2435; 2436; 2437; 2438; 2439; 2440; 2441; 2442; 2443; 2444; 2445; 2446; 2447; 2448; 2449; 2450; 2451; 2452; 2453; 2454; 2455; 2456; 2457; 2458; 2459; 2460; 2461; 2462; 2463; 2464; 2465; 2466; 2467; 2468; 2469; 2470; 2471; 2472; 2473; 2474; 2475; 2476; 2477; 2478; 2479; 2480; 2481; 2482; 2483; 2484; 2485; 2486; 2487; 2488; 2489; 2490; 2491; 2492; 2493; 2494; 2495; 2496; 2497; 2498; 2499; 2500; 2501; 2502; 2503; 2504; 2505; 2506; 2507; 2508; 2509; 2510; 2511; 2512; 2513; 2514; 2515; 2516; 2517; 2518; 2519; 2520; 2521; 2522; 2523; 2524; 2525; 2526; 2527; 2528; 2529; 2530; 2531; 2532; 2533; 2534; 2535; 2536; 2537; 2538; 2539; 2540; 2541; 2542; 2543; 2544; 2545; 2546; 2547; 2548; 2549; 2550; 2551; 2552; 2553; 2554; 2555; 2556; 2557; 2558; 2559; 2560; 2561; 2562; 2563;

(1) A hopper truck without an issue of proper maintenance. The
Mar. 7 P. D. 126 had a problem that is not well known at all. Fred,
Whitson, No. 2, 197, A.C. 137, The Line 126, 127, P. 20

10) Current: 1.5 A, Power: 100 W, 2 K, 100 W

(c) See *Hunter v. Northern Marine Insurance Co.*, 13 App. Ct. 217, 4 Eaton Smith & Owen, (1906) 1 Ch. 179.

[1] In *Blalburn, J. v. Pacific Portland Cement Co.*, 186 U.S. 390 (1902), per Lord Holmes, *Robinson v. Electric Light & Power Co.*, 4 App. Cas. 713 (1901).

(b) § 7 (2) Ante, 311

(h) [1905] 1 K. B. 324.

fixed wages. This was held to be within the exception (a) Chap. VIII. On the other hand a pilot to whom Part X. of the Merchant Shipping Act, 1891, applies is within the Act, (b) i.e. if he is a "workman" within the meaning of it. has entered into a contract of service with an employer (c). See 712 of the Merchant Shipping Act, 1891, (d) defines "pilot" as meaning "any person not belonging to a ship who has the conduct thereof."

A foreign sailor working on a foreign ship would obviously not be entitled to recover against his employer, because at the time he was injured his ship might be in British waters or in a British port (e). A foreign sailor on a British ship would equally obviously be entitled under the Act (f). But a British workman on a foreign ship working in a British port and injured, would not be deprived of the remedy of the Act, because his contract in the jurisdiction was with a foreigner. "It would be to my mind," says Lord Halsbury, C., "a most unreasonable and extraordinary extension of that immunity given to persons interested in seafaring adventure to suppose because the accident happened in or upon a ship that therefore it is to be excluded from the operation of the Act of Parliament generally. I know of no such principle; and therefore one must examine and see what the facts are that we are dealing with as regards the accident which is the subject-matter of this inquiry." In the case referred to the workman, though working upon a ship, "appears

(a) *Call v. Aberdeen Steam Trawling & Fishing Co., Ltd.* 1908 J. S. C. 225.

(b) S. 713.

(c) S. 113.

(d) *Off & on Act*, c. 100.

(e) *The M. Moxham*, 11 D. 107, per Mellish, L. J., at 113. "As to acts done on board a ship itself, no doubt the English ship carries the English law with it," and by parity a foreign ship the foreign law.

(f) S. 7 (1).

Chap VIII. to have been an ordinary labourer employed for the purpose of doing anything that was required to be done." He was held within the Act of 1897. Assume then that he had been working on a foreign ship within the jurisdiction, the owner would be none the less liable. By the present Act the workman's remedy is made more effectual by a provision for the detention of the foreign ship (a)

Seaman left behind by his ship

Where an injured master seaman or apprentice is discharged or left behind in a British possession, or in a foreign country, depositions may be taken and transmitted to the Board of Trade, and are to be admissible evidence in any proceeding for enforcing the claim as provided by secs. 691 and 695 of the Merchant Shipping Act, 1891 (b)

Domestic servants, clerks, etc

Domestic servants, hotel waiters, shop assistants, and (by virtue of the inclusion of "clerical work") the whole army of office employes, provided their remuneration does not exceed two hundred and fifty pounds a year, have the benefits of the Act secured to them (c)

Exceptions.

We are now to note the exceptions which we have divided into five classes (d)

(A) Any person (1) who is employed in any other way than by way of manual labour; and

(2) whose remuneration exceeds two hundred and fifty pounds a year.

Manual labour and manual work.

(1) Manual labour (e) has been distinguished from manual work. This latter covers work that indeed is done by the hand, but in which the brain not the muscles, is the governing factor. A navvy's work is almost exclusively the application of muscular exertion, the governing force of the brain is small, even to being incommensurable.

(a) S. 11 (1). The procedure in this particular will be considered later. *Post*, 697.

(b) S. 7 (c). *Ante*, 303.

(c) *Ante*, 442.

(e) S. 13. *Ante*, 320.

(d) *Ante*, 277.

On the other hand, with an accountant's clerk the manual Chap. VIII.
effort is small, though it is distinctly commensurable in the
entering up of books and copying out of accounts; while
the main business with which he is occupied, the casting or
co-ordinating of accounts is mainly an occupation of the
brain. To this class belong telegraph and telephone clerks,
and draughtsmen and the rest of this sort of employments.
They are yet to be reckoned as workmen till (2) their
remuneration exceeds £250 a year. A miner, for instance, if
he digs or blasts, or in any way is occupied with manual
labour in the pit, has the advantage of the Act, whatever
his earnings, but if he belongs to the class who perform
the office work, the staple of whose occupation is intel-
lectual and only subordinatedly physical, he becomes
excluded from the Act so soon as his remuneration touches
£250 per annum. To state the point somewhat differently—
where the claimant has remuneration of more than £250
per annum an inquiry has to be made—is he employed,
that is substantially, mainly employed by way of manual
labour or not? If he is, he continues entitled, if he is
not, he becomes disentitled. There is yet one more
caution: the contract must be "a contract of service or
apprenticeship with an employer," a contract where the
employer has a right to intervene and order the processes,
and is not bound to wait with his criticisms for the result.

(B) Any person (1) who is employed in a casual Casual manner.
manner, and

(2) who is employed otherwise than for the pur-
poses of the employer's trade or business.

(1) The undefined term of the first requisition of this
exception is "in a casual manner."

Chap. VIII. The phrase "the casual nature of the employment" occurs in the First Schedule." (a)

Casual. There are instances where the word "casual" has received legislative interpretation. As for example in 34 & 35 Vict. c. 108, s. 3, a *casual* pauper is defined, "any destitute way-farer or wanderer, applying for, or receiving relief."

A "*casual* ward" is defined, "any ward or wards, building or premises, set apart or provided for the reception and relief of destitute wayfarers and wanderers."

Monster v. Cammell & Co. There is also judicial authority, as for example in *Monster v. Cammell & Co.*,^(b) where Fry, J., interpreting the expression "any *casual* vacancy," in a body of directors says it means any vacancy "arising otherwise than by the retirement in rotation pointed out by the previous articles."

Hathaway v. Argus Printing Co. And more directly in *Hathaway v. Argus Printing Co.*,^(c) where Collins, L.J., says "The question is whether casual work done for the same employer can be brought in to swell the average earnings." After saying that the arbitrator must consider whether the different periods of employment are not separated by intervals which negative continuity in the employment, he adds, "To enable one to say that a series of short periods should be taken together and treated as a continuous term there must be some nexus to join them. There must be some contract express or implied which raises a reasonable expectation of continuity in the employment. In the absence of that nexus casual engagements on non-contract days do not constitute one continuous employment, for they are not bound together."

The Oxford Dictionary^(d) defines the word "casual" "depending on chance, depending on or produced by chance; occurring or coming at uncertain times; not to be calculated

(a) 8 & 1 (2) (a) *Ante*, 327. (b) 21 Cl. D. 183 at 187.
(c) [1901] 1 Q. B. 96 at 100. (d) *Giles v. Belford, Smith & Co.*, [1908] 1 K. B. 843, 844. (d) *sub voce*.

on; unsettled, coming without design or premeditation; Chap VIII. casual labourer; one who does casual or occasional jobs."

The notion prominent in these meanings is intermittance. ^{considered} Each case is independent of any other case. There is no nexus of contract that binds one case of casual employment with another, though the notion of a recurrence of employment is by no means absent, that of continuance is. Employment may be given extending over many years whenever, may be, a recurrent occasion arises, but this employment is casual so long as it is under a contract for the occasion only and not in pursuance of a standing engagement and of right. The fact that the same person is employed at recurring times to do recurring work is not even an element in the consideration whether it is casual or not, the material fact is whether the work is under a contract or not. If the employer has an unfettered right to go elsewhere, the employment is casual, if he has not then the employment is not casual, though the work done in it may be so.

The nature of casual employment has, moreover, been the ^{in Hall v. Bagge.} subject of decision by the Court of Appeal (a). Applicant was the brother of a window cleaner who met his death while cleaning windows at a private house. For two years, whenever the windows wanted cleaning, at irregular intervals of about a month or six weeks, a postcard was sent by one of the servants asking the deceased to call and clean them. The County Court judge held that this regularity of application and service constituted continuity apart from any actual contract. The Court of Appeal was of another opinion. "There was no engagement that he [the window-cleaner] should be employed. No complaint could have been made if any other person had been employed. It was uncertain when any person would have been employed."

(a) *Hall v. Bagge*, [1908] 2 K. B. 802, 21 T. L. R. 711.

Chap. VIII. "A broad distinction is taken in the Act. If a man for the purposes of his trade or business employs another, it matters not that the employment is of a casual nature, such as, for example, that of a dock labourer, and the man so employed is a workman within the meaning of the Act. But an entirely different principle is applicable to the case of what, for the sake of distinction, I (a) may call domestic engagements. I am not prepared to extend the burdens of the Act to householders who simply call in a man, not part of their regular establishment, to do a particular job, as and when necessity arises." Buckley, L.J., pointed out (b) that the words of the exception are not "who is casually employed," but "whose employment is of a casual nature." In the one case the position of the man would have to be first looked to, in the other, the employment. The L.J. thus happily illustrates. "Suppose that a host, when from time to time he entertains his friends at dinner, or his wife gives a reception or a dance, has been in the habit for many years of employing the same men to come in and wait at his table or assist at the reception, it may be said that their employment is regular. But the employment is of a casual nature. It depends upon the whim or the hospitable instincts or the social obligations of the host, whether he gives any, and how many, dinner parties or receptions, and the number of men he will want will vary with the number of his guests. In such a case the waiters may not incorrectly be said to be regularly employed in an employment of a casual nature. The employment in the present case was, I think, of a casual nature. The lady might have gone abroad for some months or might have let her house, and in either of these cases the employment would, or might, have ceased. If she remained at home there was, no doubt, a well-founded expectation of employment, which would

Buckley, L.J.'s
Illustration

(a) Cozens-Hardy, M.R.

(b) [1906] 2 K. B. 805.

normally have resulted in employment at intervals more or less regular. But the employment remained of a casual nature.* Hall v. Begg was greatly pointed upon the point in the case of Dewhurst v. Mather,^(a) where the applicant was a washerwoman who went to the place where she was ultimately injured "every Friday and every other Tuesday." The County Court judge held that this was evidence of a contract, which he found to exist, and that the washerwoman was a workman under the Act. In this he was supported by the Court of Appeal: the facts were inconsistent with any other conclusion. The work was regular though intermittent.

^(a) Dewhurst v. Mather.

(2) The second limb of this exception is that the "casual" employment must not be for the purposes of the employer's "trade or business" (*b*). Section 13 provides that "the exercise and performance of the powers and duties of a local or other public authority shall, for the purposes of this Act, be treated as the trade or business of the authority." "Trade" and "business" are not synonymous terms. School-keeping, for instance, is a business, but is not a trade (*c*). "When we look into the dictionaries as to the meaning of the word 'business' I do not think they throw much light upon it. The word means almost anything which is an occupation, as distinguished from a pleasure—anything which is an occupation or duty which requires attention is a business. I do not think we can get much aid from the dictionary. We must look at the words in the ordinary sense" (*d*).

^(b) Employment not for the purposes of the employer's trade or business.

Mr. Ruggie thinks (*e*) "that to constitute 'trade or business' there must be an exchange or barter of goods

^(e) What constitutes "trade or business"?

(a) [1908] 2 K. B. 751, 21 T. L. R. 519.

(b) See per Jessel, M.R., *Smith v. Anderson*, 15 Ch. D. 247 at 253, 260.

(c) *Hoo v. Keeling*, 1 M. & S. 98, 100. See *Mulhoney v. Todd* and the Lord Mayor of Bradford, *Times* newspaper, 25th Nov., 1908.

(d) Per Lindley, L.J., *Rolls v. Miller*, 27 Ch. D. 71, 88.

(e) *Employers Liability* (7th ed.), 229.

Chap. VIII. or exercise of an employment for the purpose of securing an advantage, which may be estimated in money or money's worth, either for the person exercising the trade or business, or for others." This is not the opinion of the Court of Appeal in the case last noticed, which was that of a charitable institution, called a "Home for Working Girls," where the inmates were provided with board and lodging, whether any payment was taken or not, nor yet of Buckley, J., in *Barnard v. The Urban Council v. Wilson* (a) nor yet probably in the common use of language, and Mr. Rugg's conclusion "that all casual labour employed by religious or philanthropic or quasi-philanthropic institutions and societies for purposes entirely religious or philanthropic is not within the Act" does not carry assent through its intrinsic reasonableness. There seems some reason in supposing that a man injured while cleaning windows for the Bible Society should be disentitled to compensation under the Act, while if he were doing the same work next door at the savings bank branch of the Post Office he could recover.

If, then, the workman is employed in a casual employment, yet one which is for the purposes of the employer's trade or business, he is not excluded from the benefits of the Act. An object of the Act appears to be to protect all workmen engaged in the industrial system of the country. Along with these are included, as it were incidentally, domestic servants and others to whom the main intent of the Act is directed, but who profit by the generality of its principle.

In the case of these last, limitations yet remain. One of these is found where the employment of a member of this class is of a casual nature; but this exception does not extend to the case of one casually employed in the course of a trade or business. The actual employment may be the same in both cases; say to pack a crate of china to send to an

(a) [1901] 2 Ch. 818, 817; [1902] 2 Ch. 145, in C. of A.

exhibition. If the exhibitor is a manufacturer sending to **Chap. VIII.** the exhibition from his trade stock, the packer is a workman within the Act. If he is the owner of a private collection and is sending choice specimens therefrom, the packer's employment is of a casual nature and is excluded from the benefit of the Act.

(C) *A Member of a Police Force*

The definition section (c) interprets this to mean "a police force to which the Police Act, 1890, *the* or the Police (Scotland) Act, 1890, *it* applies, the City of London Police Force, the Royal Irish Constabulary, and the Dublin Metropolitan Police Force

(D) *An Outworker.*

Section 13 defines an outworker as "a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale, *and* in his own home or on other premises not under the control or management of the person who gave out materials or articles "

This term first appears in the Factory and Workshop Under Factory and Workshop Act, 1891. Act, 1891, (c) sec 27; by which the occupier of every factory and every contractor employed by any such occupier in the business of the factory had the duty imposed, after an order of the Secretary of State, "to keep in the prescribed form and with the prescribed particulars lists showing the names of all persons directly employed by him, either as workman or as contractor, in the business of the factory or workshop,

(a) S. 13. *Intro.* 320

(b) 51 & 54 Vict. c. 43.

(c) 53 & 54 Vict. c. 67.

(d) *Fuller v. Quinn*, [1901] 2 K. B. 209, *Home v. Robert Green, Ltd.*, [1907] 2 K. B. 815

(e) 46 & 47 Vict. c. 58.

Chap. VIII outside the factory or workshop, and the places where they are employed."

By the Factory and Workshop Act, 1901, (a) this duty is considerably extended

The principle at the bottom of this exception is that no one is to be rendered liable for accidents arising out of or in the course of the employment of those who, carrying on their own business in their own way, and not on their employer's premises and without opportunity for his intervention or supervision, work upon articles or materials supplied by him and bailed to them to do work on

(1) *A Member of the Employer's family*

Section 13(b) names these wife or husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, half-sister

Where the workman is dead his rights pass to his legal personal representative (c) or to his dependants, (d) or other person (e) to whom or for whose benefit compensation is payable. (f)

DEPENDANTS

Definition.

The definition of dependants is simplified from the preceding Act. It now runs, (g) "such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would but for the incapacity due to the accident have

(a) 1 Edw. VII. c. 22, s. 107.

(b) 6 Edw. VII. c. 58.

(c) *Ante*, 289.

(d) *Post*, 462-476.

(e) *Post*, 518.

(f) 6 Edw. VII. c. 58, s. 18.

(g) S. 13. *Ante*, 320.

been so dependent." (a) So far the effect is substantially identical with the Act of 1897, which contemplated the inclusion of brothers and sisters both of the whole and the half-blood. There now follows an addendum by which an illegitimate child is included amongst the dependents of its parent or grandparent who may be killed through personal injuries received arising out of and in the course of his employment, in those cases where such illegitimate child was dependent on the earnings of the deceased workman; and in the like case, when an illegitimate child leaves a parent or grandparent so dependent the parent or grandparent is included as a dependent of the child, and is made entitled to the benefit of the Act.

The first question that has to be determined is what dependency is dependency? Lord Halsbury, C., in the House of Lords in *Mammoth Colliery Co. v. Davies*, (b) treated this purely as a question of fact—dependency is an ordinary word with well-ascertained popular meanings. It is to be decided in each case whether the facts bring it within that popular meaning. Lord Halsbury, C.'s words are: "My Lords, I am unable to see that there is anything in this case beyond a mere question of fact. I decline to assume that the legislature has contemplated a particular 'standard'—I am not quite certain what it means, but I am quite certain that no human intellect would be able to ascertain exactly what the standard was if one had to deal with such a question—a standard dependent upon what was the ordinary course of expenditure in the neighbourhood and in the class in which the man lived. To my mind that is a problem so

(a) These are new words, and probably unnecessary. See *Standard v. N. & S. Steel Co., Ltd.*, noticed in *Williams v. Ocean Coal Co., Ltd.*, [1907] 2 K.B. 121, *Spalding v. Robert Addie & Sons' Collieries, Ltd.*, 6 F. 912. In the rules "dependants" includes persons who claim as dependants. *W. G. R.* 1907, i. 4 (3).

(b) [1900] A.C. 858.

Chap VIII

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extremely obscure that I cannot believe that the legislature intended it to be solved. What the family was in fact earning, what the family was in fact spending, for the purpose of its maintenance as a family, seems to me to be the only thing which the County Court judge could properly regard, and that being the thing which the County Court judge ought to regard, I think in this case he has regarded it, and accordingly it appears to me that the question of fact and the only question of fact, was one which the County Court judge has properly answered." This was approved by the other learned Lords present, with the exception of Lord Shand. As Lord Davey shortly expressed the decision of the House: "That is a much more satisfactory way of construing this Act to look at their [the dependants'] actual income and actual expenditure rather than to introduce some vague and uncertain standard which it is impossible to lay down with precision."

Lord Davey
(test)

Cunningham v.
McGregor

The Scotch Courts, it is said, treated this matter of dependency, in cases of husband and wife at any rate, as a question of law. Thus, in *Cunningham v. McGregor*, (a) Lord Young says that the mere existence of this legal right to support raised the legal presumption that a wife is wholly dependent upon her husband." But in *Turners, Ltd. v. Githes or Whitefield* (b) where a wife claimed as dependent on her husband, Lord Adams says: "I do not think that the fact that the husband was under a legal obligation to support her makes any difference, it does

(a) 3 F. 775

(b) 6 F. 822. This was followed in *Findsay v. McCosh & Son*, 15 Sc. L. R. 559, where Lord Atwell expressed "conformity with what was said by the Lord President on the construction of this Act in the case of *Baird*, 8 F. 484, and in particular I concur in his criticism of Lord Young's judgment in the case of *Sneddon v. Adie*." The opinion referred to was that there is no presumption of law that a wife is dependent on her husband, but merely an inference of fact.

- not alter the fact that she was not dependent on his earnings at the time of his death" Chap. VIII.

In *Shedden v. Robert Addie and Sons Collieries, Ltd.*, (a) another case of husband and wife, where the husband deserted her and contributed nothing to her support, Lord Macmillan observed "a husband is primarily bound to aliment his wife," and *Turners, Ltd. v. Gillies or Whitefield* is treated as an exceptional case, where, "notwithstanding that primary obligation, the wife could not be said in any reasonable sense to be wholly dependent on his earnings."

The Irish case of *Queen v. Clarke* (b) is, again, the case of husband and wife. At the time of the husband's death the wife had gone to her parents and was supported by them. "Dependency," said Sir Samuel Walker, C., "whether whole or partial, is a question of fact, but I think that in the case of husband and wife the facts in proof may be such that the County Court judge is bound in point of law, to find total dependency."

Coulthard v. Consett Iron Co. (c) was also a husband and wife case, and was distinguished from *Rees v. Penrynkyber Navigation Collieries* (d) on that ground, "that there was a direct obligation on the part of the workman to support the applicant." The County Court judge on the evidence held that the wife was dependent and the Court of Appeal held that there was evidence to support his decision. "The question," says Romer, L.J., (e) "is

(a) 111 L. 2912.

(b) [1906] 21 R. 13.

(c) [1905] 2 K. B. 861.

(d) [1903] 1 K. B. 220. *The Pyrene Petroleum Navigation Collieries*, [1903] 1 K. B. 221, where Colbus, M.R., says at 221 "The wife has legally no other source of income during the lifetime of the deceased other than his earnings."

(e) [1905] 2 K. B. 876.

Shedden v. Robert Addie & Sons Collieries

Coulthard v. Consett Iron Co.

Chap VIII. whether the applicant was dependent on her husband's earnings at the time of his death; that question appeals to me to be really one of fact"; and Mathew, L.J., (c) reiterates: "The question is one of fact"

*Williams v.
Ocean Coal Co.*

In *Williams v. Ocean Coal Co., Ltd.* (b) yet again a husband and wife case the appeal was on the ground that in directing himself "in ignoring the legal presumption of dependency of the wife, the County Court judge had misdirected himself." The Court of Appeal held that this was so. In giving judgment Cozens-Hardy, M.R., committed himself to the proposition "Dependency . . . must always be a mixed question of law and of fact." "I desire," he added, "to adopt the language of Holmes, L.J., in *Queen v. Clarke*, (c) where he said: 'We have only jurisdiction to hear an appeal on a question of law, and it may be thought whether a wife is dependent wholly or in part on her husband's earnings is more a matter of fact than law. This sometimes may be so, but it is not in the present case. We have here certain admitted facts, the legal consequence of which is that the claimants are either wholly dependent or are not, and the proper conclusion to be drawn from them is a pure question of law.'" Subsequently in *Kelly v. Hopkins*, (d) where the wife was detained in an asylum as a dangerous lunatic at the time of her husband's death, and there was no evidence of the possible or probable duration of her insanity, the Irish Court of Appeal held that the presumption of the wife's dependency was not displaced.

A question con- sidered.

Thus stand the authorities. Can they be reconciled? For some of the text writers find an incongruity in them. *Main Colliery Co. v. Davies* (e) is the case of a father

(a) *L. c.* at 878.

(b) [1907] 2 K. B. 122.

(c) [1906] 2 I. R. 135 at 163.

(d) [1908] 2 I. R. 84.

(e) [1900] A. C. 368.

earning wages being found in part dependent on the earnings of his child. This holding was upheld as consistent with the facts proved. The other cases are all cases of husband and wife. They raise the point whether the existence of that relationship does not imply a dependency. That it does at common law is plain. The first resolution of the judges in the Exchequer Chamber in *Marby v Scott*^(a) is "that husbands are bound to supply their wives with necessaries", and proof that a woman is a wife would raise, wholly apart from the Workmen's Compensation Act, the implication that she is entitled to support from her husband, that she is dependent. This presumption would continue till rebutted. In showing she is wife she has established her *prima facie* right to a provision from her husband, as involved in her status as wife, and without any other proof. This right may be displaced, as *Cozens-Hardy, M.R.*, (b) says, "It is not a presumption that cannot be rebutted, but there are some circumstances which certainly are not sufficient to negative or rebut that presumption. The presumption is not rebutted by the mere fact of desertion. It is not rebutted by proof that *de facto* not one penny was being contributed by the husband to the wife's support at the time of his death. It is not rebutted by evidence that the wife was in fact being kept alive and maintained by her relations as a matter of charity or kindness. It is not rebutted merely by evidence that the wife is not being supported by her husband, or is maintaining herself by going to domestic service, earning small sums of money as a charwoman or otherwise. It is not rebutted by proof that she was in the workhouse at the date of his death. The presumption can only be rebutted by there being reasonable evidence justifying a Court in coming to the conclusion that this

Resolution in
Marby v Scott

Cozens-Hardy, M.R., in Williams v Ocean Coal Co

(a) 2 Sm. L. C. (11 ed.) 446, 1 Sid. 103.

(b) *Williams v. Ocean Coal Co., Ltd.*, [1907] 2 K. B. at 427.

Chap VIII. presumption, like any other presumption, is in fact rebutted."

In *Turners, Ltd v. Gillies or Whitfield*, (i) the presumption was held to be rebutted. In *Coulthard's case* (b) the Court of Appeal confined themselves to affirming the finding of the County Court judge, that on the facts, and without mentioning the presumption arising from the status of wife, the presumption was established.

All the instances adduced by Cozens Hardy, M.R., are merely illustrations of the wife's position at common law till the death of the husband. Then comes the Workmen's Compensation Act, and confers rights on dependants from the moment of the death of the workman. Proof that the applicant is a wife connotes that she is a dependant and entitled to the benefits of the Act as such.

Child claiming as
dependant or
father claiming

But when in place of a wife a child claims as dependant there is a difference. A child may or may not be a dependant. What the particular case may show is matter for evidence. So again with a father claiming as a dependant of a child, *prima facie* there is no dependance. Whether there is or not is matter of evidence. Yet wherever the question of evidence arises in a certain sense a question of law is involved, according to the old distinction what *can be* matter of evidence is for the judge, what *is* evidence is for the jury to determine on.

What was
decided in *Main
Colliery Co. v.
Davies*.

Now these, as it were, preliminary questions are not involved at all in the decision of *Main Colliery Co. v. Davies*. There evidence was given showing a contribution to the family fund of so small an amount that the employers claimed, as matter of law, a declaration that mere contribution by a child to a common fund could not make the father a dependant. The House of Lords answered that there was no standard possible in these cases. Each

(a) 6 F. 822.

(b) [1905] 2 K. B. 869.

case must be decided on its own facts. The House of Lords **Chap VIII.** certainly did not intimate that in the case of a wife any other presumption than the legal one was to be drawn; any more than in case of a father, it dispensed with proof, if disputed, of paternity, a mixed question of law and fact; but these relations being proved or admitted, it required proof of various sequent positions and that these were entirely matter of fact.

Any dispute as to who is a dependant is to be settled by arbitration, or after a payment into Court is to be settled by the County Court (a). It is not necessary for a dependant to take out administration to the estate of the decedent (b).

The character of the dependency of an illegitimate child was discussed in a Scotch case, *Gomley v Murray*. (c) ^{dependency of illegitimate child} The deceased man had had the Scotch analogue to a bastardy order—a decree of aliment made against him, and did not friendly regard his illegitimate daughter. The sheriff substitute found that the sum available, on his death caused by injury in his employment, under the Act was £150—that of this sum £5 10 was due to his father for funeral expenses, and that the capitalized value of the decree for aliment was £78. He accordingly assessed the reasonable sum proportionate to the injury the illegitimate daughter had received at £111 10. On appeal the First Division of the Court of Session disagreed with the method of the sheriff in arriving at this amount, and sent the case back to him. Lord McLaren's reasoning puts the view of the Court most clearly. "It is evident that the deceased was not a willing contributor to the support of his illegitimate child because he allowed a decree of aliment and

(a) Fact Schedule (S) Act, 330

(b) *Clatworthy v Green*, 18 T. L. R. 641.

(c) 45 Sc. L. R. 577. As to illegitimate child born after death of the father, *Schofield v. Orrell Colliery Co.*, Times new paper, 30th Nov., 1908.

Chap VIII. alient to go against him, and no facts are stated which variant the inference that the deceased would have contributed anything in excess of what he could be compelled by law to pay. If there are grounds for holding that the deceased voluntarily recognized an obligation to contribute to a larger extent than he was legally bound to, he [the sheriff] was right in taking such evidence into account. But I think that in awarding the whole available fund, less funeral expenses, the sheriff substitute has proceeded on a wrong principle, because the Act of Parliament does not prescribe that the maximum sum available for compensation should be awarded in every case, but only that reasonable compensation within that limit should be paid" (a)

Workmen
spending wages
on himself

The question of dependence is, as we have seen, mainly one of fact yet legal problems have not failed to present themselves to be solved. (a)

The case has been put of a man earning wages which he spends on himself, while he maintains his dependants from other sources which terminate with his life. The whims of any individual man would seem to have very little bearing on the provisions of the Act. The man is bound to maintain his dependants out of his earnings ultimately, elsewhere, if he can, and chooses to do so. If through an accident the other resources fail, the dependants are no less dependent on his earnings than if he had had no other resources. The fallacy lies in attributing to the wage-earning class modes of living appropriate to other classes.

Boy banding
parents his
wages.

In *Simmons v. White Brothers* (c) a boy of fourteen who

(a) *Croquer v. Life Coal Co., Ltd.*, [1907] S. C. 561, a now of greatly diminished importance with reference to the definition of dependant by virtue of the definition in the Act. It was the claim in respect of the death of a maternal grandfather.

(b) *Main Colliery Co., Ltd. v. Davies*, [1900] A. C. 358. *Ante*, 463.

(c) [1899], 1 Q. B. 1005. See *Coltham v. Davis & Son, Ltd.*, *Times* newspaper, 13th November, 1899.

had been at work about five weeks, earning 17s a week, **Chap. VIII.**
 had up to the time of the accident causing his death brought
 home his wages to his parents, who retained the surplus
 beyond the cost of his keep for themselves. The County Court
 judge held that the parents were "in part dependent" on
 the boy, and the Court of Appeal could not say that there
 was no evidence on which the County Court judge could
 find that the parties were in part dependent on the deceased.

There must be dependency to some extent for ordinary
 necessities having regard to the class and position in
 life of the parties. The principle is expressed by Lord
 Halden in *Mann v. Manchester & Lancashire Cotton Co.* (a) to the
 following effect: "the father of the family is by law bound
 to support his family, and is punishable if he does not.
 He in his turn obtains from the wages of those who are
 being maintained by him a partial contribution to the
 general family fund"; accordingly "he must be relying or
 dependent - call it what you please for the means by
 which he discharges his legal obligations upon the funds
 supplied to him or partly supplied to him, by the children
 who earn these funds" (b).

In *Howell v. Vivian & Sons* (c) the fact that the person
 alleged to be a dependant "can support life without the
 assistance of the deceased," was held not of itself to negative
 his status as a dependant.

Capacity to
 support life does
 not necessarily
 negative
 dependency.

In *French v. Underwood* (d) the County Court judge in
 estimating whether a father was dependent on his son's
 earnings made the mistake of taking "into consideration
 his own knowledge of the district in which the family lived
 and of what such a family would require for their main-
 tenance"; he set up a standard. Thus the House of Lords

(a) [1900] A. C. 858.
 (c) 18 T. L. R. 36.

(b) *Id.* c. at 861.
 (d) 19 F. L. R. 416.

Chap. VIII. had forbidden to be done. The proper inquiry was whether "the father was partially dependent upon the earnings of the son for contributions for the maintenance of the family."

Senior v. Fountains & Burnley.

Senior v. Fountains & Burnley, Ltd., (a) throws light on this decision. There it was determined that the widow and children of a deceased workman are not less dependent upon his earnings because from money coming to him from other channels he is enabled to live in an improved condition from what otherwise he would do. It, however, the wife—and of course this is a matter for proof by the respondents, the *prima facie* inference being the other way—is in the receipt of a private income or earnings of her own, the case becomes one of partial dependency, or may be of no dependency at all (c).

Part dependants may have the maximum compensation divided amongst them.

It may be noted that in the event of the workman leaving only dependants in part dependent upon his earnings, the sum payable to these is not necessarily lessened by reason of their having other means of support. If the arbitrator shall consider the maximum allowance in the case of dependants wholly dependent to be a reasonable one and proportionate to the injury sustained by the dependants (by their loss of pecuniary resources), he may award that sum irrespective of the fact that they have some other means (d).

The Scotch Courts have held that a claim under the Act of 1897 by a dependant wholly dependent defeats the claim of

(a) [1907] 2 K B 563, 23 F T R 634.

(b) *Kelly v. Arrad & Co., Ltd.*, 7 F 906, where a father earning wages, yet actually receiving an allowance from his son, was held not a dependant since he earned substantial wages on his own account. In *Moses v. Win Dixon, Ltd.*, 7 F 386, a daughter who could earn substantial wages, but indeed kept house for a father who was killed, was held a dependant.

(c) *Leggett v. Burke*, 4 F. 693.

(d) First Schedule (1) (a) (i), *ante*, 326. Cp. *Bortick v. Head*, 34 W R 102. *Ante*, 239.

those in part dependent on a workman at the time of his death. The reasoning by which the result is brought about is as follows: "This section, *as* when read as a whole, defines the total liability, and presents three alternative cases which are mutually exclusive. If there are persons wholly dependent, then the employer has got to pay three years' earnings, not exceeding £300. The next case contemplated is that of those partially dependent, but their right is conditioned by the opening words, 'if the workman does not leave any such (i.e. wholly dependent) dependants.' If he has left such wholly dependent dependants, then the Act does nothing for the partially dependent. There is no provision authorizing the arbitrator to carve a provision for them out of what is devoted to the wholly dependent, and no provision for any further liability on the part of the employer than what is set forth in the three cases put in the sub-section" *b*.

This is one of those decisions *prima impressionis* which one comes across now and again in the Scotch Reports. Even as dialectic it is unsound. The proposition that, if a man leave "any dependants wholly dependent" on him, the amount of compensation to his dependants shall be a fixed minimum sum is certainly not identical with the proposition that, if a man leaves any dependants wholly dependent on him, the amount of compensation to his dependants shall be divided exclusively amongst those wholly dependant on him; more especially is this not so when the term "dependants" is defined by the statute to include those partially dependant. The distinction between the two classes (i) and (ii) appears to be this: where any wholly dependent member of a family exists,

(a) First Schedule, (1) (a) (i) (ii).

(b) Per the Lord President, *Fagan v. Murdoch*, 1 F. 1179.

Chap. VIII. the minimum compensation is to be £150. Where there is no wholly dependent member of the family, the arbitrator has a discretion to award a less sum than £150.

Amended Act of 1906.

The inequity of the decision has been obviated by a provision that "where there are both total and partial dependants nothing in this schedule shall be construed as preventing the compensation being allotted partly to the total and partly to the partial dependants;" (a)

Dependant wholly dependent

The test of what constitutes a "dependant wholly dependent" was considered in *Pyrie v. Penikese Navigation Collieries Co.* The widow of a working man killed in circumstances entitling her to compensation under the Act, received £100 as his administratrix. It was contended that the receipt of this sum disentitled her to claim compensation as "wholly dependent." "I understand," said Collins, M.R., (c) "by the words 'wholly dependent,' that there was no other source of income during the lifetime of the deceased other than his earnings on which the applicant was dependent. It is said that the enquiry should be whether after the death of the husband, and taking all sources of income into account, the position of the widow could be properly described as one of dependence on the earnings of her deceased husband. That is asking the Court to say that an applicant to be wholly dependent on a workman's earnings must be a person who is reduced to destitution by his death. The Act does not say this, and if it had said so very serious complications would have been introduced in arriving at the amount of

(a) First Schedule (8) *Post*, 620.

(b) [1902] 1 K. B. 221.

(c) *L. c.* at 223.

compensation. . . . The only time at which to draw the line is the time of the death of the workman, and sources of income which may arise after that date cannot be taken into consideration." Chap. VIII.

On the authority of this case the County Court judge in *Wainwright v. Crichton* (a) held that where, the father being injured, an agreement was made between him and his son for the son to maintain the father, evidence was not admissible of the father's earning capacity to show whether the dependence was entire or partial, but he was overruled by the Court of Appeal, who were of opinion that evidence on the point should be received.

The Irish Court of Appeal have held that, where the ^{Death of sole dependant.} sole dependant of a deceased workman died after having served notice of the accident, but without having made any claim, the right to compensation ceased, and did not pass to his representatives (b).

This decision was relied on in *Darlington v. Roseau*, (c) ^{Darlington v. Roseau} to preclude recovery by the representatives of the widow of a workman who had died from injuries received in circumstances bringing the case under the Act. The widow made a claim for compensation, but before the case came on for hearing, died. The daughter then, having taken out letters of administration, took proceedings in the County Court. But the Court of Appeal held it sufficient to distinguish the Irish case on the ground that there no claim had been made for compensation. If a claim were made as in the present case, the representative is entitled. Such a distinction appears wholly without substance. A

(a) 117 Law Times newspaper, 2.

(b) *In re O'Donovan and Cameron*, Swan & Co. [1901] 2 L. R. 633.

(c) [1907] 1 K. B. 219.

Chap. VIII. time is given for making a claim. If the claim is made within the time either by the dependant or the representative, there appears no ground in the Act for making a distinction. If the claim is made outside the time the dependant himself is precluded. Even before the claim is made the dependant may not impossibly have anticipated the payment. How then no reason can it be that the legal representative of the dependant is cut down in the time during which he may assert a vested right of the dependant not arising out of a tort, where no limitation can in any way be drawn from the Act itself? (a)

A result of the alteration in the definition of dependants in the Act of 1906 is that now in Scotland, the mother of a dead workman is entitled to be ranked as a dependant though the father is living.

Under the old Act grandchildren whose father was dead, and who were dependent on their paternal grandfather, were already so entitled. (b)

Statute of British
subject not
essential.

The right of a dependant is not conditioned on his having the status of a British subject, as in *William Baird and Co Ltd, v. Savage*, (c) where a claim was made by the wife of a workman resident in Poland as dependant on her husband, who while working in Scotland had been used to send her £1 a week, which she supplemented by her independent earnings. The Court of Session amended the sheriff's decision that she was wholly dependent into a finding that she was partially dependent on his earnings. (d)

(a) *Cp. Peebles v. Oswaldtwistle Urban District Council*, [1906] 2 Q. B. 159.

(b) *Hanlin v. Molrose*, 1 F. 1012.

(c) 8 F. 438.

(d) *Cp. Davidson v. Hill*, [1901] 2 K. B. 606.

THE EMPLOYER.

Chap. VIII.

THE Act of 1897 proceeded from an enumeration of certain employments by "undertakers" to a distribution of them into a number of sub-classes which formed the backbone of the Act, and by far its obscurest portion. "Employer" was there stated to include "any body of persons, corporate, or incorporate, and the legal personal representative of a deceased employer." (a) There it stopped. The new Act continues, "and where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this Act, be deemed to continue to be the employer of the workman whilst he is working for that other person."

We have before noticed that where a "definition" clause provides that the word it professes to define shall, as in this case, include the matters defined, it is to be used for "interpreting words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain"; (b) it is for enlarging, not for restricting, for sweeping in things not ordinarily or obviously within the meaning of the word in its usual connotation. Thus employer means a person who proposes a contract of service and whose offer is accepted. The definition adds whether one or many, corporate or incorporate, and the legal representative of a deceased employer.

(a) *Infra*, 314. If the words are introduced with reference to the rule in *Gillet v. Fairbank*, 3 T. L. R. 618, there are probably unnecessary, for a claim under the Act does not arise out of a tort, but is a statutory subvention, the right to which survives, though representatives are not named. *Prebles v. Oswaldtwistle Urban District Council*, (1896) 2 Q. B. 159. The Act speaks of "compensation, not damages."

(b) *R. v. Pearce*, per Lush, J., 5 Q. B. D. at 389.

Chap. VIII. The real substance of the definition of employer is to be collected from that of workman. An employer is one with whom a "workman," within the definition in the Act, has entered into or works under a contract of service or apprenticeship. Workman and employer are, so far as this Act goes, strictly correlative terms, and what is said of one holds good of the other, making allowance for the alteration of the standpoint. If difficulties arise the considerations ruling at common law will provide a line of guidance. In searching for an employer we are treading familiar ground, and the tests and suggestions before set out will afford all the aid cases or general considerations can do. The collections of fact may be infinite, the principles fairly plain. The only disturbing element is the provision as to sub-contracting, which will presently be dealt with (*b*).

All the rest is quite plain, whether under the Act of 1906 or by the common law. There may be more doubt as to the provision about the workman "temporarily lent." Lord Chief Justice Pratt had to say, in *Lynch*,^(a) very positively and down, "If I lend my servant to a neighbour for a week or any longer time, and he goes accordingly, and does such work as my neighbour sets him about, yet all this while he is on my service and may reasonably be said to be doing my business," though the law has long been settled otherwise,^(b) if the control is with the borrower,^(c)

(a) *Ante*, 13.

(b) *Ibid.*, 181.

(c) (1718) 1 Salk. 601, 1 Campbell, Lives of the Chief Justices, vol. ii. 216.

(d) *Dowman v. Lang, Wharton & Down Syndicate*, [1893] 1 Q. B. 622.

(e) *Ante*, 130.

In such cases, under the Workmen's Compensation Act, Chap. VIII. 1906, the presumption is now conclusive in accordance with Pratt, C.J.'s view; and the contract of the workman is not altered by the change of his work, unless with his own consent the liability of his original employer is not taken away. The presumption under the Act where a servant is lent.

As the Crown, except as regards the military and naval services, is within the Act, (a) the head of any department by, in or under which the workman alleged to be injured was employed, or if the head is a Board or Commission, the Board or Commissioners shall be made a party under his or their official title as representing the Crown, and service of process is to be on the permanent secretary of the department (c).

The provisions as to employer under sec. 8, by which the Act is applied to industrial diseases have been considered elsewhere (d).

The cases where the employer or the workman is a foreigner, or where the contract is made in a foreign country, are to be noted. A contract made in a foreign country for work to be done in England is *pro uti loquitur* to be construed by the law of the country where it is made (e), but this is subject to the consideration whether there is any indication in the contract itself of what law is to prevail; if there is, the contract has to be interpreted by that law (f). Thus, if Italian workmen are brought from Italy on a contract made in Italy, to work in England and with the rights only of workmen under the Italian law (whatever these may be), apart from the Act the contract would be good. But assume that having entered into such a contract after the

(a) S. 9(1).

(d) W. C. R. 1907, 1, 79 (1). Ibid. 12.

(e) *Id.*, 13b.

(f) See Lord Stowell in *Dalrymple v. Dalrymple*, 2 Hagg. Cons. 61.

(g) *In re Mission Steamship Co.*, 12 Ch. D. per Lord Halsbury, C., 385.

Chap. VIII. Act, the Italian workman is injured, can he recover under the Act in the teeth of his contract? Most probably he would have this right; since sec. 3 (1), the contracting out section, provides "that, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary." The work to be done is work for the doing which protection is given as a matter of state policy; and that policy should not admit of defeat by the method of making the contract out of the jurisdiction, even with the subjects of another nation who do not wish for the protection, and by the merited exclusion of the native labourer. Were any other view taken in addition to the legal difficulties to be surmounted, there would be a "Chinese slavery" question amongst us of altogether unmanageable proportions. It is clear that an alien while in the jurisdiction is entitled to the benefit of the Act; and no one entitled to the benefit of the Act is entitled to contract out of the Act, save in the way provided.

Case of contract
with alien
workman

Foreign employer with workman in the jurisdiction. The case of a foreign employer living outside the jurisdiction employing workmen within it does not differ. Those workmen are entitled to the benefits of the Act and, save as in the Act intimated, cannot disentitle themselves.

British workmen
of foreign
employer in
foreign country.

But if British workmen work for a foreign employer in the foreign country, the principles already indicated apply: the law of the country governs, if not, the law of the contract; and, save possibly in an action on the contract, the workman cannot get any benefit from the Act.

Cases prob.

Take the case of a British contractor engaging men in England to work in Egypt. If the engagement is under a written contract and the workman is injured in circumstances to which had the work been in England the Act would have applied, the workman may sue at common law on the contract, or probably in the appropriate Court in

Egypt. But it does not appear that he can adopt the procedure of the Act, for the simple reason that neither the Second Schedule of the Act (11) nor the rule made thereunder apply, nor can be moulded to apply (a). If the accident is in a British Colony, then *prima facie* the law of the colony applies. Generally it may be said that the Act does not apply outside the jurisdiction of the County Courts, or of any jurisdiction by the Act identified with the County Courts (b).

But a British *extra territorium* with his servants travelling in a foreign country where one of his servants is injured would be liable to proceedings by the servant on his return; and in analogous circumstances a British workman could recover. Difficulty might arise through the provisions of Second Schedule (11) (c), and indeed would be necessarily fatal to some of the cases we have just considered.

The considerations here noticed do not apply in the case of seamen, whose position is specially provided for by the Act (d).

Sub-CONTRACTING.

Section 1 (1) introduces us to two new definitions which do not occur in the definition section - the "principal" and the "contractor." This is rendered necessary by the general scheme of the section, which aims at preventing the dividing up the responsibility for a large work into fractions, whereby the security of the workman for his compensation may be greatly curtailed. (e)

A "principal," according to the section, is one who in the course of, or for the purposes of his trade or business,

(a) W. C. R. 1907, at 73-75. (b) S. 13 "County Court." *Ante*, 322.

(c) *Ibid.*, 335.

(d) *Ibid.*, 308. *Post*, 450 and, as to Definition of Ships, 197.

(e) See *Mahoney v. Todd and the Lord Mayor, etc.*, of Bradford, 25 T. L. R. 103.

principal
contractor.

Chap VIII. contracts with any other person for the execution by or under such other person of the whole or any part of the work that such contracting person has undertaken. A "contractor" is the person with whom any such contract is made.

*Johnson v.
Lindsay.*

The common law previously to the decision of the House of Lords in *Johnson v. Lindsay* (a) had been stated by Lord President Inglis in *Woodhead v. Gartness Mineral Co.* (b) as follows:— "The whole persons engaged in a mine form one organization of labour for one common end (how- ever different their functions may be, and are subject to one general control exercised by the mine owner or those to whom his authority is delegated). This community of labour and of subjection to control arises from the very nature of the work, and from the necessity of providing against danger and ensuring the maintenance of discipline. But it is systematized and made even more directly binding on all by the statute (c) and the special rules enacted under its authority. The persons employed in a mine, superior and inferior, contractor and workmen, of whatever class or whatever their functions may be, are by those rules erected, so to speak, into one community, who have their relative duties assigned to them, and who owe each to his neighbour many duties which it would be impossible to enumerate. To such a community as this, and to its individual members, the mine owner is under certain well-defined obligations, but to hold that his obligations and liabilities to the individual workmen depend on whether they are technically his servants or employed by a contractor on piecework in some limited portion of the mine, while it would be inconsistent with legal principle, would also, I think, introduce great confusion where it is desirable

(a) 1891, A. C. 371.

(b) 1 R. 499 at 179.

(c) The Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 52.

that everything should be as clear as possible, and where the statute makes the inter-dependence of the whole community and then necessary reliance on one another for safety, the regulating principle of their association and the basis of all the special rules for their guidance." Chap. VIII.

The instance of a mine in the management of which there are, in addition to the general scheme of working, minute statutory rules that must be observed is given merely as a type. The remarks of the Lord President are general and the principle of the law in this matter may be readily referred thereto.

In *Johnson v. Lindsay* (a) this further proposition was enforced, that the defence of common employment can only be set up by the master of the injured and injured man; and that taking the existence of that relationship, the defence does not apply. *Johnson v. Lindsay.*

The common law immunity of the head of the scheme of common work was deeply trenchled upon by sec. 1 of the Workmen's Compensation Act, 1897, the scope of which was indicated by Collins L.J. in *Wigley v. Bagley & Wright* (b) "The scope of that section is clear enough. It contemplates the case of persons who being undertakers, in respect of a particular business, substitute for themselves a contractor to do some part of that business, and provides that the workmen of such contractor shall have the same rights against such persons as they would have if they were employed by them. The reason of such a provision obviously is, that if a person substitutes another for himself to do that which is his own business, he ought not to escape the liability which would have been imposed upon him if he had done it himself towards the workmen employed in that business." *Wigley v. Bagley & Wright.*

(a) [1891] A. C. 371.

(b) [1901] 1 K. B. 780 at 788.

Chap. VIII. By sec. 4 of the Act of 1897 the "undertaker," as he is there called, became liable to the workman of any sub-contractor employed in any portion of the entire work for any accident "arising out of and in the course of the employment," whereby the workman is injured. He also became liable to the sub-contractor's workmen in respect of personal negligence or wilful act of the sub-contractor independently of the Act. That is, he was liable for --

- (1) Injuries sustained by the workmen while working with the sub-contractor, arising out of the negligence or default of the sub-contractor,
- (2) Injuries occasioned by defective machinery or a defective system of work,
- (3) Injuries occasioned by the neglect of statutory precautions.

Thus the head contractor's common law liabilities to a workman injured while working with a sub-contractor were increased, inasmuch as independently of the Act the sub-contractor was regarded either as a foreman or a fellow workman, (a) in neither of which capacities would the head contractor be liable for his acts causing injury to a fellow servant; while by the Act he was made liable in either case as if the sub-contractor's negligence or default were the head contractor's own personal negligence or default. By sec. 4 of the Workmen's Compensation Act, 1906, the "principal's" liability at common law is no longer regarded, and is instead confined to the "compensation under this Act which he [the principal] would have been liable to pay if that workman [i.e. any workman employed in the execution of the work] had been immediately employed by him."

(a) *Rourke v. White Moss Colliery Co.*, 2 C. P. D. 205; *Weggetter Fox*, 11 Ex. 332. This, of course, was before *Johnson v. Lindsay*, [1891] A. C. 371.

The section only applies to contracts .

Chap. VIII.

- (i) in the course of or for the purpose of the principal's trade or business;
- (ii) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal;
- (iii) where the accident occurred on, or in or about premises on which the principal has undertaken to execute the work or which are otherwise under his control or management.

In these requisitions there are several points which require to be cleared up.

The primary intention seems to be to redress what was esteemed the harshness of the common law. We may therefore take it that the typical case to which the section is applicable is some large work, *e.g.* the building of the Law Courts, where while there was one principal, the head contractor, there were many subordinate contracts to him, and these the subject of subdivision.

The section provides that in a case like this "the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him." Instead of not being liable to any he is made liable to all. But the accident must occur in "carrying out a contract, in the course of or for the purposes of the principal's trade or business." The words of the old Act were, "This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incident to and is no part of, or process in, the trade or business carried on by such undertakers

Chap. VIII. respectively." (a) The interpretation of these words was that the section was not to apply where the work out of which the accident arose could not rightly be described as work undertaken by the contractor (that is, according to the Act of 1906, the principal) in the ordinary course of his trade or business.

This consideration then is sufficient to render germane the cases decided under the Old Act.

Cases.

Herron v. Charnley—The Rhenish Co., Ltd., Third Parties, (b) is an early decision under the Act. Charnley undertook to do joinery work at the mill of the third parties. Appellant while at the work was injured. Appellant claimed against Charnley. Charnley claimed indemnity against the third parties. The County Court judge made an award against the third parties. In the Court of Appeal the objection was urged, and was successful, that "the company was not his [appellant's] employer, and Charnley was not an undertaker within the meaning of the Act."

This was followed by *Ponner v. L. & S.-W. Ry. Co.* where the applicant was in the employment of contractors, who were doing work on a station of respondents' under a contract, in the course of which the applicant was injured and claimed against the railway company. The County Court judge held that the work the applicant was engaged in was ancillary merely. He was affirmed by the Court of Appeal. "The primary business of a railway company is to carry passengers and goods. The erection of stations does not appear to me to be any part of, or process in, that

(a) 60 & 61 Vict. c. 37, s. 4, last clause.

(b) *The Times* newspaper, 15th February, 1900, 2 W. C. C. 21.

(c) [1900] 2 Q. B. 100.

11 E. (d) *Id. v. Collins*, L.J., at 102. The Irish case, *Brennan v. Dublin Road Tram Co.*, [1901] 2 Ir. R. 241, is to the same effect.

business. I am not aware of any legal obligation upon Chap. VIII.
 railway companies, apart from any special obligations imposed
 by particular Acts, to erect railway stations at intermediate
 places. It is a matter in their discretion." "The work
 upon which the appellant was engaged, namely, the building
 of a station, was not, in my opinion, a part of or process in
 the business which the company carried on."

This reasoning, which seems cogent, is in direct conflict ^{Scotch case in conflict}
 with the Scotch case of *Burns v. North British Railway*
Co. (a). The First Division of the Court of Session there
 held that the workman of a firm engaged to erect signals on
 a new siding was engaged "on a railway on work of which
 the railway company were undertakers." It is also inconsis-
 tent with *Beech v. Owens, (b)* where a firm of manufacturers
 of chemical matches contracted for all carting in connection
 with their business. The Scotch Court held that the manu-
 facturers were liable to pay compensation to a servant of the
 contractors who was injured while engaged in carting.

Greenhill v. Caledonian Ry. Co. (c) was a very similar
 case, only the contract for carting was with a railway
 company.

In *Dundee and Arbroath Ry. Co. v. Carlin (d)* the Second <sup>English cases followed in Dundee and Arbroath Rail-
way Co. v. Carlin.</sup>
 Division of the Court of Session (Lord Young dissenting)
 followed *Pearce v. L. & S.-W. Ry. Co. (e)* in a case where
 a workman was killed by a train while engaged in the con-
 struction of a wall to prevent soil coming down a bank, and
 blocking the access to a signal cabin, under a contract, and
 held that the work was ancillary to the railway company's
 business. The Court, while faintly suggesting that *Burns v.*
North British Ry. Co. (f) was distinguishable, indicated that
 they preferred the English case.

(a) 2 F. 629.

(b) 2 F. 439.

(c) 2 F. 736

(d) 3 F. 843.

(e) [1900] 2 Q. B. 100.

(f) *Supra*.

Chap. VIII. The Scotch judges were unanimous in the next case that came before them on this point. A window-cleaner in the employment of a window-cleaning company was sent to clean the windows in a tailor's workshop, which was a factory within the Act. The man was injured, and claimed against the tailors as the undertakers. There was no hesitation in holding that window-cleaning was not a part of, or process in, a tailor's business (a).

Wrigley v.
Bagley & Wright

In Wrigley v. Bagley & Wright and Whittaker & Sons, (b) Whittaker & Sons were engineers who employed the appellant's husband in fixing a driving wheel for the steam engine belonging to the cotton spinning factory of Bagley. Appellant's husband was killed. She claimed alternatively against the respondents. The County Court judge held that the work deceased was engaged in was merely ancillary. He was approved by the Court of Appeal. "One case," says Collins, M.R., (c) which came before this Court in *Pearce v. L. & S.-W. Ry. Co.*, (d) namely, that of altering a railway station, afforded an excellent illustration of work which was merely ancillary or incidental to, and formed no part of, or process in, the work of a railway company. The present is, in my opinion, an equally good illustration of work which is ancillary to, as distinguished from work which forms part of, a business. Putting a new driving wheel into an engine used in a cotton spinning factory cannot, I think, be described as part of or a process in the business of cotton spinning." The decision of the Court of Appeal was affirmed in the House of Lords in favour of the deceased's employer, on the ground that the accident did not occur at the undertaker's factory. There does not seem to have been any appeal against the decision in favour of the cotton spinners holding

(a) *Demster v. Hunter & Sons*, 39 Sc. L. R. 395.

(b) [1901] 1 K. B. 780. (c) *L. c.* at 783. (d) [1900] 2 Q. B. 100.

that the work was, so far as they were concerned, ancillary Chap. VIII.
only. (a)

In *Cooper & Co. v. McGovern* (b) the First Division of the Court of Session returned to the line of decision indicated by *Bee v. Owens*, (c) notwithstanding the adhesion of the Second Division to the line of the English cases in *Dunlop and Arlough Ry. Co. v. Carlin*, (d)

But Scotch view
reasserted in
*Cooper & Co. v.
McGovern*

The appellants were sausage makers, and their premises a factory within the Act. The injured man was a carter, employed by a railway company to collect goods for forwarding on their line. At the time of the accident the carter was with his lorry, and had loaded goods from the appellants' premises on his lorry—a distance of 32½ feet. He got jammed between his own lorry and another lorry standing close to it, and was injured. The sheriff substitute found, as a fact, that the goods which the carter was conveying at the time of the accident belonged to the appellants. He also found, as a fact, that "the carrying of their goods from their premises in Glasgow to their premises in Leeds and London is part of the business of the appellants."

The appellants' goods were collected by the railway company under the terms of a contract of through carriage from Glasgow to Leeds and London to other premises of the appellants. The Court of Session on these materials held that the appellants, the sausage makers, were undertakers of the business of collecting their goods, conveying them and delivering in Leeds and London. This remarkable decision is based on the "finding of fact" that the carrying of goods was "part of the business of the appellants," and this statement, in the judgment of the

(a) [1902] A. C. 299, *sub nom.* *Wrigley v. Whittaker & Sons*.

(b) 4 F. 219.

(c) 2 F. 439.

(d) 3 F. 813.

Chap. VIII. Lord President, was "sufficient to conclude the question."

— In England a finding of fact, which there is no evidence to support, is set aside, and on that ground. Further, the Lord President relies on the authority of *Powell v. Brown* (a). This case was an employment about a factory. The injured man was in the direct employment of the occupier of the factory, and engaged in the work directly undertaken by the employer when injured. The question of ancillary employment not only did not arise could not arise, and the case has absolutely no bearing on the question of whether an employment is "a part of or a process in the trade" carried on by undertakers at a factory. Lord McLaren dissented in an admirable judgment, expounding the interpretation of the section and constituting the sole reason why, outside Scotland, this case should ever be noticed.

Principle of the
English cases
Knight v. Cubitt

Knight v. Cubitt & Co (b) brings us back again to common sense. The appellants habitually made contracts for the demolition of buildings, in which it was usual for them to insert a "pulling down clause," but their practice was not to do that work themselves, but to make a sub-contract for it. One of the sub-contractor's men being killed at the work, the claim was made against the appellants, who resisted it on the ground that they were not "the persons undertaking" the "demolition," the statute aiming at those who actually execute the work. The Court of Appeal held otherwise. "It was part of the appellants' business to undertake the demolition of buildings, without which they could not carry on the work of re-building; and it is immaterial, in my opinion, that they found it more convenient in practice to sub-contract for that part of the work which they had contracted to do." "I would point out," continues Collins, M.B., (c) "that the question in this

(a) [1899] 1 Q. B. 157.

(b) [1902] 1 K. B. 81.

(c) *L. c.* at 86.

case arises under sec. 1 of the Act, and under that section the 'undertakers' are *supposed* persons who have deputed to a sub-contractor the execution of work undertaken by them. The evidence showing, as I have said, that it was the appellants' usual practice to undertake the work of demolition, it seems to me impossible to say that that work was merely ancillary to the trade or business carried on by them."

Bush v. Hawes^(a) is the converse of Knight v. Cribb,^(b) and the two cases enable the law to be clearly comprehended. Knight v. Cribb, as we have seen, was the case of builders building a new house, and before they could proceed with the work, they had to pull down an existing house. The work of demolition was made a regular part of their contracts. Thus it was that the County Court judge was justified in finding the work of demolition to be a "part of or process in" their business. Bush v. Hawes was the case of a builder constructing a building, part of which required an iron roof, which was supplied by other people. The County Court judge having found that the erecting the iron roof was not part of the business of the respondent, the Court of Appeal held reversing him that he was not justified in holding that the erection was other than "merely ancillary or incidental thereto." (c) "This finding," says Stirling, L.J., "is not affected by the view that appears to have been taken by the learned judge that putting up an iron roof would generally form part of such a business as the respondent carried on."

In reading these cases, to appreciate their full relevancy the word "principal" must be substituted for contractor and "contractor" for sub-contractor. But note must be taken of

(a) [1902] 1 K. B. 216.

(b) L. C. at 220.

Chap. VIII. the different words of the section in the Act of 1906—"in the course of or for the purposes of his [the principal's] trade or business" against the words of the Act of 1897—"no part of or process in the trade or business earned on." In this connection some further of the old cases may be noticed.

**Percival v.
Gerner.**

In *Percival v. Gerner* (a) the facts showed that chemical manufacturers were adding to their own premises. They provided the material, and the building was being erected from the plans of their own architect. The chemical manufacturers, however, agreed with Percival the appellant for the supply by him of labour for the brickwork, and under this agreement the appellant sent bricklayers and labourers as they were wanted for the work. The men so sent were under the supervision of the foreman of the chemical manufacturers, and the appellant was responsible for no part of the work, but he paid their wages and made his profit from the difference between what he got and what he paid to them. One of the labourers was killed. Proceedings were taken against the appellant, whom the County Court judge found to be an "undertaker." The Court of Appeal reversed him. The chemical manufacturers were the only persons undertaking the construction. "The building was being built on their own land, from the plans of their own architect, and under the supervision and control of their own foreman; they wanted labour for the building, and went to the appellant to supply it, which he did. In my judgment," said Smith, L.J., (b) "it is impossible to hold that the appellant, who merely supplied the labour, was an undertaker within the meaning of this Act." (c)

(a) [1900] 2 Q. B. 406.

(b) *L. r.* at 408.

(c) The distinction is the civil law one between *locatio operarum* and *locatio operis*.

Two Scotch cases must be mentioned here, *McGregor v. Dunsken*, (a) and *Stalker v. Wallace*, (b). In the former the owner of a building contracted with another to repair the building for him. He did not himself engage in the work. He was held not to be the undertaker. In the latter a builder engaged in the erection of a building for his own use, and did the work partly by his own workmen, partly under contracts for other persons for particular branches of the work. He was held to be the undertaker for the whole building, and therefore liable to pay compensation. But further, in *Mason v. Dean* (c) it was held that a contractor for a separate substantial part of a building who contracts with the building owner is an undertaker within the meaning of the Act. "I think," says Smith, J., (d) "that if any person undertakes a material part of the construction of a building . . . he is an undertaker." "The use or occupation of any given thing may well be subject to the use of the same thing by some one else, provided that the two do not conflict." (e)

By the aid of the materials afforded in these decisions we may solve several would-be problems as to what is "the principal's trade or business." It seems then that the mere executing of work will not make a "principal," for the element of doing it in the employer's trade or business may be wanting. The contractor is liable in any case. A man undertaking to build a house for himself may be a principal even though a private person and no builder (by business) (f).

(a) 1 F. 536.

(b) 2 F. 1162.

(c) [1901] 1 Q. B. 770.

(d) *L. c.* at 774.

(e) *Buttall v. Gray*, [1902] 1 K. B. at 229; *Weavings v. Kirk & Randall*, [1901] 1 K. B. 213.

(f) See *Stead v. Moore*, 2 W. C. C. 96; *Stalker v. Wallace*, 2 F. 1162.

Chap. VIII. There may also be more than one principal in carrying out an extensive work, *e.g.* in constructing a large building, as the Law Courts

Some commentators on the Act have discovered, as is the manner of their kind, a particular significance in the word "undertaken"; and have refined on the speculation whether this word means that the principal is doing the work for himself or for other people. In its natural and ordinary meaning it so obviously has both these meanings that the point may be summarily dismissed. That to "undertake" is not synonymous with to contract to do must be very obvious to any one who undertakes to read a heavy law book and at the end of his undertaking does not succeed, say, in passing the examination, to do which he had undertaken the unoriginal labour. What we undertake has commonly little enough to do with our contracts.

The section only applies to accidents occurring on or in, or about premises on which the principal has undertaken to execute the work or which are otherwise under his control and management.

The considerations relevant under the Act of 1897 may be resorted to for the meaning of the words "on or in or about premises."

On or in or about
premises.

These words indicate that the fact of an accident happening off the premises will not exclude from liability if the accident is such that it was substantially caused by work done on the premises; unless the work were within the exception of the third clause of sec. 4 of the Act of 1897, and "merely ancillary or incidental to, and no part of or process in, the trade or business carried on" upon the premises.

Work upon railways, factories, mines, quarries, engineering

work or buildings, in fact anywhere in the condition Chap. VIII.
designated as being subsidiary to the principal end in distance an
view, is within the Act, but not the work of those element
engaged in employments equally helpful to the main
enterprise carried on apart from it by any considerable
interval in space. Thus, in *Monaghan v. United Fisheries*
Co., (a) the Fishery Company were using their engines to Monaghan v.
United Fisheries
Co.
remove sand from a sand hole abutting on one of their
sidings under a contract with the owner, when a man in
their employ was killed on the railway line at or near the
extremity of the siding. The Court of Session held that
the Fishery Company were "not undertakers in respect
of their mercantile business, but in respect of their owner-
ship of the mine and siding, and their employment of
workmen in these dangerous places." Again, in *Caledonian Ry.*
Co. v. Breshin, (a) a smith was injured while shoeing Caledonian Ry.
Co. v. Breshin
horses belonging to the company in a smithy wherein he
was employed within the area occupied by the company
as a general station. The horses were used for hauling
trucks and the goods business. It was held that the smithy,
being used for the purpose of facilitating public traffic, was
"used for the purposes of public traffic" within the meaning
of the Regulation of Railways Act and therefore formed
part of the railway. *Milner v. Great Northern Ry. Co.* (c) Milner v. Great
Northern Ry. Co.
is not in conflict with these cases. The appellant there,
a waitress in the refreshment bar, was excluded, not
because she was not employed about the main business of
the Company, but because she was not employed in any
part of the "station" within the meaning of the Regulation
of Railways Act, 1873 and was consequently not employed
"on or in or about a railway." "The meaning is that at
the time of the accident the workman must be employed

(a) 3 F. 119.

(b) 2 F. 1158.

(c) [1900] 1 Q. B. 795.

Chap. VIII upon one of those specified localities; and the locality of the accident must be within the purview of the section "(a)"

Powell v
Brown

The words "on or in or about a factory" were the subject of decision in *Powell v Brown* (1). Defendants were occupiers of a factory from which they loaded goods on carts in the street outside. One of their carters while engaged in loading one of their carts was killed by a fall of timber he was loading. Smith, L.J. said (a) the place in question "is not inside the factory, nor is it on the factory premises, but it is just outside them," and "is a place which is habitually used when goods are being taken from the factory to be sold or taken away." The deceased "was in the employment of the factory owners," and "was as much engaged on the business of the factory as if he had been carrying the timber to stow it on the cart." Referring to the words "on or in or about," the Lord Justice thus continues: "It is obvious that the Legislature thought that the first two words were not large enough to cover all that they intended to include, and they therefore added the word 'about,' which is clearly an enlarging word. In my view, that word means that the employment may be in close proximity to the factory, and whether that was so in any particular case is a question of fact to be determined by the tribunal before which the claim comes. The judge in this case has found that the deceased was employed 'about' the factory, and this brings the case within the statute."

Chambers v
Whitehaven
Harbour
Commissioners,

(Chambers v Whitehaven Harbour Commissioners (d)) was, on the point at present being examined, much the same

(a) *Chambers v Whitehaven Harbour Commissioners*, (1889) 2 Q. B. 132, per Smith, L. J., at 134.

(b) [1899] 1 Q. B. 157, followed in *Lowth v Hbbotson*, [1899] 1 Q. B. 1003.

(c) *L. c.* at 159.

(d) [1899] 2 Q. B. 132.

as the earlier cases. A harbour was being dredged by a steam dredger; the mud was discharged from the dredger into hoppers, which were taken out to sea and emptied. One of the workmen employed on the dredger went in his turn on the hopper to help to discharge it. When a mile and a half out he was knocked overboard and drowned. "The man," says Smith, L.J., (a) "was not killed on the dredger, if he had been, I incline to think that he would have been within the Act" [i.e. employed on or in or about an engineering work], "but I do not decide it, he was killed while employed on the hopper, which was in a similar position to the cart in the cases cited, (b). Was he then at that time employed on an engineering work which was going on on, on or about the dredger? I am clearly of opinion that he was not. If the mud had been taken away by a cart instead of by a hopper, the case would have been precisely the same as *Lowth v. Hobson*."

Yet, though the judge may find as a fact that an accident has occurred 'about' a locality, he could not under the Workmen's Compensation Act, 1897, any more than under any other Act, exercise that jurisdiction without any evidence to support his finding or without a proper direction to himself. It is not left at large under this Act any more than under any other statute," says Collins, L.J., (c) "to the County Court judge to find a question of fact without guiding the exercise of his own discretion by a proper direction in law. If he could try such a case with a jury he would be bound to give them the best direction he could as to the class of cases that would or would not come within the meaning of the word 'about'. No doubt it is not possible to define exactly the meaning of such a word as

Must be evidence
to warrant
finding

(a) *L. C.* at 135.

(b) *Powell v. Brown*; *Lowth v. Hobson*, *supra* a.

(c) *Fenn v. Miller*, [1900] 1 Q. B. 738 at 732.

Chap. VIII. 'about': but the judge could assist the jury by illustrations of its meaning, or by taking extreme cases which obviously fall on one side or the other of the line that is to be drawn by the jury, guided, as they should be, by his illustrations."

In the case before them, where an accident happened to a water cart between 110 and 160 yards from a barn wherein was a steam engine working a mortar mill, which thus was constituted a "factory," the Court of Appeal held that there was no evidence of "such physical contiguity as to come within the meaning of the word 'about' as used in the Act."

A distance of 115 yards from a warehouse was held not "on or in or about" in *Tench v. Fish* (a).

*Tench v.
Fish.*

*Holness v.
Mackay & Davis*

In *Holness v. Mackay & Davis* (b) the injury was sustained seven minutes before the hour for the commencement of work and "some distance" from the place of it. The Court of Appeal held that the claim was not brought within the Act.

*Holmes v. G. N.
Ry.*

In *Holmes v. G. N. Ry.* (c) as we have seen, (a) the finding of fact was that the employment began when the workman took train at King's Cross to get to his work at Hornsey. This therefore differentiates the case. A distance of 550 yards away was held not to be "about" a yard in *Barclay, Curle & Co. v. McKinnon* (d). Similarly, 800 yards away was held not "about" a factory in *Kent v. Porter*, (e) while in *Broche v. North British Railway Company*, (f) three-quarters of a mile from the junction of a railway with a private line was held not to be "on or in or about" it. *Turnbull v. Lamerton Collieries* (g) is practically identical.

*Barclay, Curle &
Co. v. McKinnon.*

Kent v. Porter.

*Broche v. North
British Ry. Co.*

*Turnbull v.
Lamerton
Collieries.*

(a) 15 Judge Howland Roberts, *Law Times* newspaper, 11th May, 1901, 3 W. C. C. 110.

(b) [1899] 2 Q. B. 319. (c) [1900] 2 Q. B. 401. (d) 145, 381.

(e) 38 So. L. R. 321. (f) *L. c.* 482. (g) *L. c.* 38.

(h) 18 T. L. R. 169. So is *Davies v. Rhymney Iron Co., Ltd.*, 10 T. L. R. 829.

Middlemiss v. Middle District Committee of Berwick (a) **Chap. VIII.**
 was a case where a road had been repaired by means of a steam roller, and a watering cart had been used in the work. The driver of the cart had left the place where the steam roller was, and was watering a piece of road a quarter of a mile away. While at that distance he met with an accident which caused his death. He was nevertheless held to be within the Act since the physical area of the engineering work on which he was engaged extended to the place where the accident happened. The case was followed by the Court of Appeal in *Atkinson v. Lamb* (b). The work in that case was the construction of a reservoir and the laying down pipes for the supply of water from it. A workman was laying the pipes at a point 500 yards distant from the reservoir when he was injured. He was held to be employed "on or in, or about an engineering work" at the time.

The County Court judge in *Spacey v. Dowlais Gas & Coke Co.* (c), led away from the axiom that gas works were a factory under the Act of 1897, arrived at the conclusion that a gas main a quarter of a mile distant was an extension thereof. The Court of Appeal did not accede to this view, and held that a workman at the main was not "about a factory."

The difference under the Act of 1897 between an engineering work and the other employments included in that Act as regards working "on or in or about" the respective areas is illustrated by *Rogers v. Cardiff Corporation*, (d) where the whole extent of a corporation's tramway system was held "on or in or about" an engineering work.

(a) 2 F. 392.

(b) [1903] 1 K. B. 861.

(c) [1905] 2 K. B. 879.

(d) [1905] 2 K. B. 832; *Pattison v. White*, 20 T. L. R. 775.

Chap. VIII. The distinction between the words "on or in or about" in sec 7 (1) and the word "near" in sec 7 (3) of the Act of 1897 must not be lost sight of. The words "about" and "near" are themselves not by any means synonymous, and their collocation is very different.

Wigley v. Whittaker & Sons

The decision of the House of Lords in *Wigley v. Whittaker & Sons* (*b*) is conclusive as to this. "To make the employer liable the accident must take place in his factory, whereas here it was on the premises of others where work was being carried on. The thing manufactured by the respondents had been completed and finished on their own premises and sent to what might under other conditions, be a 'factory'; but the Act meant the factory of the person who was to be liable for accidents. Here the work was executed entirely away from the respondents' place of business. The appeal was really unarguable."

Cosgrove v. Anglo-American Oil Co.

The Irish case of *Cosgrove v. Anglo-American Oil Co.* (*c*) has been commented on as inconsistent with *Lenn v. Miller* (*d*). Respondents were the owners of premises covering fifteen acres for the manufacturing and storage of barrels, these were manufactured in a factory and stored in another part of the premises some distance away. Appellant was injured while removing a barrel from the storage to another part of the premises to be painted. The Lordship of Dukes found that the barrels at the time of the accident were at a "considerable distance from and not in 'close proximity' with the factory. The case thus was on the other side of the

(a) *McMullan v. Purday*, 21 F. 21, where two miles from a shipbuilding yard was held to be 'near'. Cf. *A. G. v. Bonner* 11 App. Cas. 66, for the meaning of the word 'near' when considered in relation to the bounds of a market.

(b) 18 T. L. R. 559. To the same effect, only longer, in the report, [1902] A. C. at 301.

(c) 84 Ir. L. T. R. 56.

(d) [1901] 1 Q. B. 788, *Bowstead*, *Workmen's Compensation*, 67.

line indicated in *Powell v. Brown*. The injured man was not employed 'about' a factory." To this is objected *Collins, Ltd.*'s observation in *Fenn v. Walker*: (a) "What sort of case is it that is covered by the word 'about'?" One case that would obviously fall within the meaning of the word is where the business of a factory involves the use of some land beyond the actual physical limits of the buildings; employment on that land, which may be regarded as a quasi-annex of the factory, would be employment 'about' the factory." The judgment of *Fitzgibbon, Ltd.*, is, however, perfectly consistent with *Collins, Ltd.*'s opinion. The barrels were manufactured in the factory, then stored; then removed to be painted. "As soon as they were removed from the factory they were outside the scope of the Act." "The word 'about' cannot be measured by mere physical proximity to the factory; there must be some connection." The finding of the Recorder was in effect that there were two businesses--the making and the painting. Storage was an intermediate stage. Because two businesses are carried on next door to one another there is no greater liability under the Act for an accident happening in one chargeable against the other than if they were ten miles apart.

This ground of decision would also cover the case of *Burr v. William Whiteley, Ltd.* (b). The applicant was head salesman in the hat department of the respondents, whose premises were in two blocks separated by an underground passage. The applicant's department had no machinery, but once a month or thereabouts, he had to go to the other block where machinery was used. On one occasion, returning from the dining-room, he was injured. He was held not to be engaged "about" a factory.

(a) [1900] 1 Q. B. 788 at 793.

(b) 19 T. L. R. 117.

Chap. VIII. An accident was held not to happen "on or in or about" a railway when a man in the employment of a railway company was injured at a considerable distance from the premises of the railway company on a siding belonging to a private trading company, and used entirely for the latter. This was on the ground that the "siding" was not a siding belonging to the railway company within the definition in the Regulation of Railways Act, 1873 (*a*). Now by sec. 106 (1) of the Factory and Workshop Act, 1901, (*b*) any siding used in connection with a factory or workshop, or with any place to which any of the provisions of the Act are applied, is to be deemed part of a factory.

Refreshment
room.

Employment in a refreshment room at a railway station is not employment, "on, in or about a railway," since the refreshment room is not used "for purposes of public traffic," but only for the comfort or convenience of passengers, neither is a bookstall, nor an hotel (*c*). But a carrier in the employment of a railway company who was engaged at a goods station, and who was killed while endeavouring to stop a runaway horse, was held to be engaged "on or in or about a railway" (*d*). This is the mere application to railways of the principle established in England with regard to factories by *Powell v. Brown*. (*e*) It was strenuously argued that the bolting of a horse was not an accident arising out of the employment. The answer seems to be that it was an inherent weakness in the plant employed. (*f*)

(*a*) *Rhodie v. North British Ry. Co.*, 3 F. 75, 38 Sc. L. R. 38.

(*b*) 1 Edw. VII. c. 22.

(*c*) *Milner v. G. N. Ry. Co.*, [1900] 1 Q. B. 725.

(*d*) *Devine v. Caledonian Ry. Co.*, 1 F. 1105.

(*e*) [1899] 1 Q. B. 157.

(*f*) *Cp. Yarmouth v. France*, 19 Q. B. D. 647, *ante*, 181.

Caledonian Ry. Co. v. Bieslin (a) is a decision of the Chap VIII. Scotch Court somewhat difficult to assent to. A railway ^{stable} company kept a number of horses in a stable within their premises at one of their stations. There was a smithy there besides, at which the horses were shod. A smith engaged at the smithy was injured. A claim was made in respect of an employment "on or in or about a railway." The company submitted that the stable and smithy were not "used for public traffic." The Court of Session held that the injured man was employed about a railway, on the ground that he was fitting a part of the railway plant for the purpose of conducting the traffic. It may be observed that he might equally well have been thus occupied in America.

Lord Adam was even more thoroughgoing in the canon he formulated. He prescribed the test to be whether the ^{the reasoning of the Scotch judges} stables and smithy were used for the purpose of *facilitating* the public traffic. The definition in the Regulation of Railways Act, 1873, says "every station" "belonging to such railway and used for the purpose of public traffic." "He was," says the Lord President, referring to the injured man, "fitting a part of the railway plant for the purpose of conducting the traffic, as much as an engine-fitter or an engine-cleaner preparing an engine to haul a train." That may be conclusive to show that he was engaged in doing work for a railway company, but it does not advance the real question whether he was engaged in an employment "on or in or about a railway." The Lord President's test would have been complied with had the stables been ten miles distant from the railway. (b) In *Milner v. G. N. Ry. Co.* (c) Collins, L.J., speaking as to the facts in

(a) 2 F. 1158. Cf. *Mooney v. Edinburgh District Tramway Co.*, 4 F. 390.

(b) Cf. *Cosgrove v. Anglo-American Oil Co.*, 141, 34 Ir. L. T. R. 56; also s. 119, sub-s. 4, Factory and Workshop Act, 1901 (1 Edw. VII. c. 23).

(c) [1900], 1 Q. B. 795 at 799.

Chap. VIII. that case, says: "In the present case the building as a whole, that is, the station, was no doubt used for the purposes of public traffic; *the question is whether this particular part, the refreshment room, was used*, and I think that it was not."

Breslin's case is not grappled with from this standpoint, unless "used for the purpose of public traffic" and "used for the purposes of facilitating public traffic" are phrases of identical value, and the latter is appropriately used to describe the labours of a farmer showing a horse.

The Lord President also treats the matter as concluded. Since "they" (the horses) "are clearly employed in the business of the company as earners, or, in the language of the Act of 1873, 'for the purposes of public traffic'" -- a method of reasoning suggestive of that of the schoolmaster of Themistocles's son in the story.

Bathgate v. Caledonian Ry. Co.

Bathgate v. Caledonian Ry. Co. (a) takes a view more in accord with the English cases. A cartier in the employment of contractors with a railway company for the cartage of goods to and from a station of the company had delivered some of the goods at the station. Thus finished his day's work. As he was leaving the station with his horse and lorry on the way to the contractors' stable the horse took fright and bolted. The cartier was injured by the horse and lorry dashing into a shop 315 yards away from the station. The Court of Session held that the accident was not "on or in or about a railway." The cartier was no longer engaged in the work of the railway, and nothing was being done connected with any of its processes which caused the horse to take fright and run away; so that the accident was not within the Act.

Back v. Dick Kerr & Co., Ltd.

The House of Lords was divided in opinion (three against two) in *Back v. Dick Kerr and Co., Ltd.*, (b) on the

(a) 4 F. 313.

(b) [1906] A. C. 325.

meaning of the words "on or in or about an engineering work." A horse tramway system was being converted into an electrical tramway system. Within a few yards of one of the lines of rail there is a railway yard, part of which, by arrangement, was appropriated to stacking rails for use in this work. In unloading there some of the rails the appellant was injured. In the opinion of the County Court judge this was "on or in or about" the work. The Court of Appeal held that there was no evidence of this: their opinion was upheld by the majority of the House of Lords. Lord Davey expresses the view of the majority. "The work of stacking the rails cannot properly be described as 'engineering work,' within the definition. It may be said to be preparatory or ancillary to it, but not, I think, a part of it. The appellant was employed in unloading the truck and stacking the rails in the station yard by the licence of the railway company, but the rails might as well have been loaded in a cart and hauled to the work, or they might have been stacked at the nonwork where they were made until they were required for use. Nor do I think the employment can properly be said to be 'about' the engineering work. I do not think this is a mere question of comparative proximity. It is difficult to give any very definite meaning to this word, and I doubt whether it adds anything to the description which the Com. would not have included by construction. I can, however, imagine a case where the man might actually be outside the ambit of the 'railway, factory, mine, quarry, engineering work' or building, but assisting in an operation carried on within the ambit." Lord Loreburn, C.'s view, to which Lord James acceded, was that the question was a question of fact, which was concluded by the finding of the County Court judge.

Lord Davey
gives the view
of the majority.

Lord Loreburn,
C., and Lord
James dissent.

A workman was engaged in driving a train on a private B.E.L. 2 L. Adjacent to or about a mine.

Chap. VIII railway belonging to his employers from a colliery to their coal depôt. When the train was come to a point three-quarters of a mile from the pit's mouth, the workman struck his head against a waggon standing in a siding through leaning too far out from the engine, and was killed. The County Court judge awarded compensation under the Act on the ground that the accident occurred "on the appellants works and adjacent to the mine." The Court of Appeal reversed this, holding that "the accident clearly did not happen on or in or about the mine, because it happened three-quarters of a mile away from the mine. There remained the question whether the meaning of the word 'mine' was enlarged by sec. 75 of the Act of 1887, so as to include this spot three-quarters of a mile away. The words in that section, 'adjacent to and belonging to the mine,' meant physically adjacent to and belonging to the mine itself, and not merely belonging to the mine owner" (c).

*Monaghan v.
United Collieries*

This does not seem to harmonize with the decision in *Monaghan v. United Collieries* (c) unless the respective distances, three-quarters of a mile and eighty yards, make the difference. The owners of a coal mine, and of a siding about eighty yards in length, made a contract with the owners of a sand pit situate on the line of railway which the siding connects with the mine, to carry sand from the pit in railway waggons to the colliery siding for removal thence by the railway company. A man engaged in the work was killed on the railway line, but, in the opinion of the Court, so near to the siding that it could be said to be "on or about" the siding. Thus, it was said, it was just as much part of the mine as the underground workings. Therefore, the employment of the man was "about a mine."

(a) *Turnbull v. Lambton Collieries, Ltd.*, 16 T. L. R. 369, *Coylton Coal Co. v. Davidson*, 7 F. 727.

(b) 8 F. 149.

The words of the Act, it will be noted, are "sidings . . . in Chap. VIII. and adjacent to and belonging to the mine." The second point decided was to give the words of Lord Kinnear: "The carrying of sand for hire was not part of the proper business of the respondents as a colliery company. But that seems to me to be nothing to the purpose. They are not undertakers in respect of their mercantile business, but in respect of their ownership of the mine and siding, and their employment of workmen in these dangerous places." Lord Kinnear's exposition can scarcely be taken literally, else if the mine owner had carpenters making a fence for his mining property, or shepherds or haymakers there, they would be within this construction of the Act. There is a manifest conflict between this dictum and the ^{discussed.} decision of the Court of Appeal in *Turnbull v. Lanabton Collieries*,^(a) that the words "adjacent to and belonging to the mine" meant physically adjacent to and belonging to the mine itself, and not merely belonging to the mine owner." By the Factory and Workshop Act, 1901, sec. 106 (1), (b) the siding used in connection with a mine, *i. e.*, a factory, becomes part of the factory.

In *Davies v. Rhymney Iron Co.*, (c) a colliery company provided a train on their railway to take their colliers to their homes. The colliers did not pay to travel by the train, and it was at their option whether or not they used it. An accident happened three-quarters of a mile from the colliery. The Court of Appeal affirmed the County Court judge that the accident did not arise out of the employment. The workmen had an option whether to travel by the train or not. Collins, J.J., also concurred in

(a) 16 T. L. R. 369.

(b) 1 Edw. VII. c. 22, s. 106 (1).

(c) 16 T. L. R. 329, *Hammer v. Premier Gas Engine Co.*, 23 T. L. R. 610.

"On or in or about a mine."

Chap. VIII the opinion that the accident did not happen "in or on or about" a mine.

*Andrews v.
Andrews &
Mears.*

Sub-section (d) of sec. 1 of the Act of 1906 was considered by the Court of Appeal in *Andrews v. Andrews & Mears*, (a). It was admitted that the effect of sec. 1 was to remove the limitation in the Act of 1897 on the liability of the employer to compensate workmen in the case of accident happening "on or in or about" the works of the undertaker as regarded claims against the workman's immediate employer. But the words were introduced in the case of a sub-contract. The interpretation is the same as it was under the old Act. It was pointed out by the Court that "under the new Act a liability is first imposed in all cases in favour of a workman against his employer, and then in certain cases there is an additional liability against a person who is called 'the principal, although the workman is not employed by such principal but by a sub-contractor.' The limitation to such principal's liability is marked by sub-sec. (d).

The facts were: the appellant had contracted to do paving work near the Albert Hall. Part of the contract was to remove rubbish. This had been sublet. Deceased was engaged in the carting. While on a journey removing the rubbish, having gone about two miles distant from the Albert Hall, he fell from his cart in the public street and was killed. The County Court judge found that the appellant was liable to pay compensation. The Court of Appeal reversed his decision. "We are asked," said Cozens-Hardy, M.R., "to hold that this accident occurred 'on or in or about premises' on which Mears had undertaken to execute the work or which were 'otherwise under his control or management.' I am entirely unable to see how that

(a) [1908] 2 K. B. 567.

contention can be supported." "To say that any portion of Chap VIII. the roads radiating from the Albert Hall and extending to any distance over which the sub-contractor might be minded to take his cart can be considered as premises on or in or about which Means had undertaken to execute the work, or which were otherwise under his control or management, seems to me to be giving a wholly unnatural and unjustifiable meaning to the language of the proviso of the section. In my opinion the dependants of the deceased workman in the present case have a remedy, of course, against his employer" but not against the appellant. Buckley, L.J., added the remark that "premises" "implies some definite place with metes and bounds," and also that "a place 'otherwise under the control or management' of the principal" does not comprehend a public street at all.

Working between tramway lines at another employment, ^{Adams v. Shaddock,} in the case in point telephone work, is work on or about a railway and so "engineering work" within s.c. 7, sub-s.c. 2 of the Act of 1897. This was held by Collins, M.R., on the ground that "obviously the governing notion [of the Act] was that the work was such as would bring the men employed under it into specially dangerous relations. Therefore, *by whomsoever the workman was employed* whether by the tramway owner or by somebody else, if he was so employed upon work which entailed a physical alteration of the railroad—in the present case a tramway—the employment was brought within the line of danger." Romer, L.J., dissented on the ground that the employment of men to lay a telephone wire in which every care was used not to interfere with the tramway or the working of it was not, as a matter of law, an alteration of the tramway, and thus of a railroad within the Act. (a) One's intelligence instinctively leans to Romer, L.J.'s view, but the matter has ceased to be of importance.

(a) *Adams v. Shaddock*, [1905] 2 K. B. 859.

Chap VIII. Premises on which the principal has undertaken to execute the work indicate in the case of a building work the site of the operations; in the case of an excavation, the place where it is to be or is being made, and so on in accordance with the particular work undertaken to be executed; and "which are otherwise under his control or management" must be limited by his capacity as undertaker of the works, and probably include in the first instance given the building yard and sheds, and in the second, any premises where the *débris* from the excavation is shed, though this may be doubtful, or the place where the machinery to work with is kept.

The proviso—"that where the contract relates to threshing, ploughing, or other agricultural work, and the contractor provides and uses machinery driven by mechanical power for the purposes of such work, he, and he alone, shall be liable under this Act to pay compensation to any workman employed by him on such work" is substantially an expansion of subsec 2 of sec 1 of the Workmen's Compensation Act, 1900. The reason of it seems to lie in the discrepancy between the methods of ordinary farming and of farming in its scientific mechanical developments. The application of dynamic and mechanical forces to husbandry has developed into an independent business. Probably there was a reasoned objection to give the trained operatives brought down to a farm for special work a remedy against the farmer, who would naturally be most loath to encounter a series of risks of whose import he could not even surmise, and on account of men of whom he had absolutely no knowledge. So distinct is this class of work from that ordinarily undertaken on a farm, that in its classification it is much nearly akin to the work done for an independent employer than for a "principal."

It must be noted that the section only extends to the **Chap. VIII.**
workmen of the contractor. The principal is liable under
the general law for harm befalling his own labourers, though
happening from the importation of the new machinery.

The proviso also applies where the contractor "provides
and uses" the machinery. If he only provides it, then
on the common law doctrine, he would not be liable for
reasonably fit machinery used by another man's servants.
If the machinery were not reasonably fit the common law
would also provide the remedy. But if the contractor sends
his trained men to use the farmer's machinery the contractor is
liable for any accident under the definition of "employer," (a)
by which one lending servants continues liable to them.
This is something like *Percival v. Garner*, (b) only the Act
alters the law.

There have been under the old Act several decisions
which may serve to assist in the apprehension of the phrase
"machinery driven by mechanical power."

A point ruled in a case, *Bennett v. Aird* (c) otherwise *Bennett v. Aird*,
of little or no authority, was that the words "mechanical
power," being *equivalent* with the steam and water
power which were mentioned with it in the old Act, were to
be construed with reference thereto, and that therefore "a
pulley and chain suspended on shears fastened together at
the top, forming a tripod," and set in action by manual
power, is not within the Act. This rule is in accord with
the decision in *Willmott v. Paton*, (d) where Stirling, L.J.,
says, "If the use of any instrument worked by hand power
constitutes the premises a place where machinery is worked"

(a) Sec. 13. *Ante*, 319.

(b) [1900] 2 Q. B. 406.

(c) 1 W. O. C. 138.

(d) [1902] 1 K. B. 237 at 241.

Chap. VIII. by steam, water, or other mechanical power, then every place in which a pulley or a crowbar is used to impart motion falls within the definition. I do not think that the expression "mechanical power" is fairly capable of such an extended meaning."

Wrigley v.
Bagley &
Wright

Wrigley v. Bagley & Wright (*a*) had previously decided that pulleys worked by a winch were not machinery driven by mechanical power, though it was sought to distinguish the "mechanical power" of the winch from the hand power which set it in motion.

Boe v. Fraser

Similar want of success befell a similar attempt in *Boe v. Fraser*, (*b*) where it was argued that the fitting of an air compressor from a quay to a bary for removal by means of a hydraulic jack was an engineering work. But where machinery driven by electric power was used for the purpose of testing a hay-cutting machine, which during the course of fitting it up from time to time was set at work, and a workman was injured, the Court of Session decided that the workman was employed on a work for the construction of which machinery driven by mechanical power was used though the actual fitting up of the machine was done only by manual labour" (*c*). All these cases are now embraced in the Act of 1906, which extends to personal injury in "any employment."

INDEMNITY UNDER SEC. 1.

The principal is entitled to be indemnified by any person who would have been liable to pay compensation

(a) [1901] 1 K. B. 790.

(b) 1 F. 1017.

(c) *Reid v. Fleming*, 9 F. 1000; cp. *Purves v. Sterne*, 2 F. 887.

to the workman independently of this sec. 4. All questions of indemnity in default of agreement are to be settled by arbitration under the Act. This indemnity is quite distinct from the indemnity under sec. 6 against a third person; *that* can only be enforced by action. Chap. VIII.

In the case of a claim to indemnity under this section, the principal has to file a notice of his claim in a prescribed form *a* ten clear days before the day fixed for the arbitration. claim to indemnity

Non-appearance at the arbitration involves an admission of the validity of any award made against the respondent as to any matter which the judge has jurisdiction to decide in the arbitration as between the applicant and the respondent whether such award is made by consent or otherwise, and also the liability of the person served as above, to indemnify the respondent to the extent claimed in the notice given by him *b*. How to bind

The judge may adjourn the proceedings in the event of sufficient cause for him to do so being shown. *c*

At the hearing the judge may, if the third party makes default, on the application of the unsuccessful respondent, "make such an award as the nature of the case may require in favour of the respondent against the third party." Execution is not to issue without leave of the judge till after satisfaction made by the respondent in respect of the applicant's claim against him. The judge retains power to set aside or vary any award made against the third party. *d* The third party may apply before or at the hearing for directions, and the judge give such directions as he may think proper for having the question between the respondent and the third party most conveniently

a: (a) W. C. R. 1907, r. 19. *Post*, 725

(b) W. C. R. 1907, r. 20.

(c) *Ibid*

(d) W. C. R. 1907 r. 21.

Chap. VIII. determined and as to the mode or extent as to which the third party is to be bound by the arbitration, (a) The judge has full power over all questions of costs as between the third party and the other parties to the arbitration, (b)

The determination of a question of indemnity between respondents shall be subject to the same procedure as that provided for between a third party and a respondent, (c) as was required by the decision in *Appleby v. Harshey Co., Ltd.* (d) "Notice is a necessary preliminary to any indemnity proceedings, and is the foundation of the procedure dealt with," in the rules cited.

If the workman has a right to recover compensation against the contractor, nothing in this Act is to be taken as substituting the right against the principal for that against the contractor. The workman has either right at his option, but not both, (e)

(a) W. C. R. 1907, r. 22. *Per* 1746.

(b) W. C. R. 1907, r. 23.

(c) W. C. R. 1907, r. 26, (d)

(e) 1899, 2 Q. B. 521, 526.

(f) s. 4 (3)

CHAPTER IX

COMPENSATION

The consideration of the question of compensation raises **Chap. IX.**
some of the most difficult points in the construction of the
Act.

The assessment of compensation by the County Court
judge is final. "This Court has no right to say whether a
County Court judge was right or wrong as to amount when
he merely assessed a certain sum as compensation which he
had a discretion to assess." (*a*)

There is nothing to prevent an agreement to take a sum
in compensation, and to abandon all resort to the Act.

The provisions of sec. 3 (*b*) are with reference to con- ^{Agreed composi-}
tracts excluding the provisions of the Act, and substituting ^{tion.}
some other arrangement. They do not touch the case of a
composition agreed on between an employer and a workman
who is injured, and whose claim under the Act has become
vested. Where arbitration proceedings are taken under the
Act other considerations intervene (*c*)

The agreement is liable to be invalidated in the way
pointed out when the validity of a receipt was being con-
sidered. (*d*)

It has been suggested that where there has been an ^{Not to be}
^{reviewed.}

(*a*) *Per Collins, M.R., James v. Ocean Coal Co., Ltd.*, 20 T. L. R. 488
at 484, (1904) 2 K. B. 213

(*b*) *Ante*, 303.

(*c*) *Ante*, 335.

(*d*) *Ante*, 116.

Chap. IX. agreement as to compensation which takes the form of a weekly payment, such agreement may be reviewed under paragraph 16 of the First Schedule. (a) The answer to this seems to be that in the case put there is no weekly payment *under the Act*.

Where workman dies

The case has also been put of the workman receiving full compensation by agreement and then dying, can his dependants claim the amount of compensation to which they would have been entitled had he not been compensated? Even though there is a fair and full settlement with the deceased and a payment under the Act, this—whether a weekly payment or a lump sum—does not preclude the claim of the dependants, but is to be deducted from what the dependants would else have been entitled to, for the payment of compensation is a right given to the dependants subject to this deduction, (b) and which, consequently, the workman may not alienate. On the wording of the Act it would appear that where the payment has not been made under the Act no deduction can be made. The words of the First Schedule (1) are “any weekly payments made under this Act, and any lump sum paid in redemption *thereof* shall be deducted from such sum.” If any of the money paid has come into the hands of the dependants, equity would compel its being taken into account.

The section (c) dealing with notice cannot affect the matter, since in case of death the notice is to be given within six months of that event, and has no relation to the time of the injury.

The acceptance of compensation is *prima facie* evidence

(a) *Ante*, 333

(b) First Schedule, par. (3). This is very considerably altered from the analogous provision of the old Act (*ante*, 328). See procedure as to payment into Court and investment under First Sched., par. (7), W.C.R. 1908, r. 4. *Post*, 496.

(c) S. 2, *ante*, 301.

of an agreement, and a bar to a further claim, but the circumstances of the acceptance may be looked at to rebut this presumption. The law is stated in Proposition VIII. of Chapter V, Part I. (a)

Chap IX.

The scheme of the Act considers compensation under the Act the headings of

(1) Compensation to the relatives in cases of death

(2) Sustentation to the workman during disablement.

(1) The compensation which is payable to relatives in consideration of a death by accident in the circumstances bringing the case within the Act is further treated under the heading of

(a) Total dependency, that is, where any relatives are left who were wholly dependent upon the earnings of the deceased at the time of his death,

(b) Partial dependency, where there are no relatives left wholly dependent upon the deceased, but where there are some whose means of living were supplemented by the deceased, and who were consequently partially dependent, and

(c) where no dependants of any kind are left

(2) Sustentation to a workman injured in the circumstances we have considered, and which bring him within the Act, is similarly apportioned in respect of whether the workman is

(A) totally disabled or

(B) partially disabled.

These four sets of circumstances we are now to consider in their order.

(a) *Ante*, 116.

Chap IX

Death

(1) COMPENSATION TO THE RELATIVES IN CASE OF DEATH.

(A) *Total Dependency*

Total dependency.

We have already dealt with the question of who are dependants, and there is no need to recur to it (a).

The compensation payable is a minimum sum of £150, or a maximum sum of £300.

Method of computing compensation

The method of arriving at the exact figure differs according as the deceased has or has not been for the three preceding years to the accident in the employment of the employer in which he has met his death.

1. Where the workman has been employed three years at least.

If, for example, the deceased had been employed for the three years preceding at a wage of £2 a week or upwards, his dependants would be entitled to £300 between them.

If the deceased had been employed for the three years preceding at a wage of £1 a week, his dependants would be entitled to £150.

If the deceased had been employed for the three years preceding at a wage of 30s a week, his dependants would be entitled to £231.

If the deceased had been employed for the three years preceding at any sum less than about 19s. 3d a week [19 2½], his dependants would be entitled to £150.

But if the deceased had not been employed for the three years preceding, then a different mode of computation is resorted to; observing always the maximum and minimum limits already indicated.

2. Where the workman has not been employed three years.

If the deceased has not been employed for three years

the average weekly earnings during the period of his actual employment is to be ascertained, and this sum is to be multiplied by 156 Chap IX.

If, for example, the deceased had been employed for one week at £1, the amount of his earnings is deemed to be £624. His dependants would consequently be entitled to the maximum award of £300.

If the deceased had been employed for two years and a half at a varying wage from 25s. to 35s. a week (say half the time at each rate of wages), the weekly average would thus be 30s., and this multiplied by 156 would give £234 as the amount of compensation. If, however, the deceased had been employed for less than a week at 10s. a week, his dependants would, nevertheless, be entitled to an award of £150.

In each of the foregoing cases a deduction would be made from the sum thus arrived at in respect of any weekly payments made under the Act and any lump sum paid in redemption thereof. In a case then of death where the deceased is within the Act and leaves dependants wholly dependent upon him, the function of the arbitrator in fixing the compensation is merely arithmetical. He has no discretion; the result is merely a computation.

The cases given are without complications. But complications most often arise, and the First Schedule (2) (a) provides generally that "average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." Average weekly earnings.

It may also be remarked that while three years is the standard period in case of death, twelve months is the standard period in case of partial incapacity. But in either

Chap. IX. case failing employment for the standard period an alternative is given for taking an average for a lesser period.

Temporary or casual employment

In stating the various aspects the question of compensation may assume, we have anticipated the doctrine of some of the cases which we must now notice. In *Russell v. M'Clusky* (a) the workman had only been in the employment for two weeks, yet the maximum limit of £300 was held applicable, and in *Forrester v. McAllum* (b) the employment had been only for portions of two weeks, and the wages were no more than an average of 12s, yet the minimum of £150 was held exigible. *Leonard v. Baird & Co., Ltd.* (c) was an even stronger case. The man was killed before he had had time to earn wages, he had descended into the pit to work as a miner, but had not actually commenced work.

Lord Macnaghten in *Lysons v. Knowles*

Lord Macnaghten, in *Lysons v. Knowles*, (d) is very explicit: "Where death results from the injury, and the workman has left dependants, the compensation must be at least £150. It is to be £150 or a sum equal to either the actual amount or the hypothetical amount of his earnings for the three years immediately preceding the accident, not exceeding in any case £300. But if the workman has not served the full period of three years, and if you could not find a basis on which to calculate the hypothetical amount, the compensation would, I think, still be £150."

The compensation is based on the "earnings" of the deceased at the time of his death; or where the period of three years has not been accomplished in the employment of the same employer, then on the "average weekly earnings." These terms, therefore, we must proceed to consider.

(a) 2 F. 1312.

(b) 88 Sc. L. R. 438.

(c) 3 F. 891.

(d) [1901] A. C. at 93.

In *Price v. Marsden & Sons* (a) the contention was that the words "average weekly earnings during the previous twelve months, if he has been so long employed," ought to be construed as meaning "if he has been so long employed in the same kind of employment." The effect of this construction would be that if a workman were employed for nine months in one capacity and were then promoted to another place at a higher remuneration, the average on which compensation would be fixed was that of the three months in the higher grade. The Court held that the word meant "if he has been so long employed by the same employer," and not "if he has been so long in the same grade of employment" (b).

Chap. IX.
Average weekly earnings

Now by Part Schedule, par. 2(c) it is specially provided that employment by the same employer shall be taken to mean "employment by the same employer in the grade in which the workman was employed at the time of the accident." Thus the contention that was overruled in *Price v. Marsden & Sons* is now established to be law, and "in taking the average we are restricted to the period during which the workman has been employed in the same grade. If therefore he has been promoted by the employer to a higher grade and is in this grade at the time of the accident, his earnings when in the lower grade are not to be taken into consideration in obtaining the average which is to give his average weekly earnings."

Price v. Marsden & Sons, decided by the Act of 1906.

It has also been contended that where the workman's wages are more than £2 a week, so that in the event of injury within the Act he would *prima facie* be entitled to the maximum allowance, a less sum than the maximum

How computed.

(a) [1899] 1 Q. B. 493.

(b) *Cp. Noel & Hedruth Foundry Co.*, [1896] 1 Q. B. 453.

(c) *Per Fletcher Moulton, L.J., Perry v. Wright*, [1908] 1 K. B. 457.

Chap. IX. should be awarded, if the injury compensated for is not of the maximum gravity. The contention is that a proportion should be observed between injury and compensation, even where it is admitted that the loss of wages is greater than the utmost amount of compensation payable. The Act, however, is not to be treated as an Act providing for compensation for personal injury, but as a provision against loss of pecuniary means consequent on injury. The scale of compensation does not measure the seriousness of injury by a maximum of £1 a week; but makes provision for loss sustained by injury up to the limit of £1 a week. So soon as loss is proved compensation is assumed up to the maximum and in proportion to the injury and not to the maximum. *Borlick v. Head*, (a) decided upon sec. 3 of the Employers' Liability Act, 1880, enforces this view. As Cave, J., says in that case, the section "does not give a measure of damages, but the limit of the maximum damages which may be awarded under that Act."

*Keast v. Barrow
Hematite Steel
Co.*

The method in which the "average weekly earnings" are to be computed was the subject of decision in the Court of Appeal in *Keast v. Barrow Hematite Steel Co. (b)*. For the employers it was contended that the true method was "to take the total amount the man had earned during the previous twelve months—that is to say, if he had been so long employed—and divide that amount by fifty-two, the number of weeks in the year." The contention on the part of the claimant was that, "in making the calculation, those weeks or day in weeks during which the workman had not been actually employed ought to be excluded, and that, therefore, where he had not been working continuously throughout the whole year, the divisor ought not to be

(a) 34 W. R. 102, reported 53 L. T. 909, and 2 T. L. R. 103, *sub nom.* *Borlick v. Head*. *Inte*, 239.

(b) 15 T. L. R. 141. *Cp. Small v. McCormick*, 36 Sc. L. R. 700.

fifty-two, but some lower number." The Court of Appeal adopted the view presented on the part of the employers. "The total amount of the year's earnings ought to have been divided by fifty-two, and not by any less number excluding the weeks when the man was not at work." The effect of this decision is that when workmen, miners for instance, make holiday for a day or two a week, compensation for accident is to be reckoned not on the rate of earnings per week, but on the actual earnings. An effort was made by the appellant's counsel to contend that the period that the appellant had been away from work must be taken as a break in the employment. If this were so the employment would have been for less than a year, and the average during the period of employment would have been taken, of course excluding the period of the break. The question whether a break in employment is no more than a holiday or the termination of the employment, so that the resumption of work operates as a re-engagement, is a matter of fact, which in the case under discussion was determined adversely to the appellant. This point is now cleared up by *Bailey v. G. H. Kenworthy, Ltd.* (a)

In *Jones v. Ocean Coal Co., Ltd.* (c) the workman was in the employment for six months, and then went on strike for five months, when the contract of employment was only determined by notice. On 12th September, 1898, he re-entered the service under a fresh contract of employment. On 3rd October, 1898, he was injured. The workman contended that only the period between 12th September, 1898, and the date of the accident should be regarded. The employers asked that the average of the whole twelve months before the accident should be taken and divided by the number of weeks during which the appellant was

Intermittent
employment.

(a) [1909] 1 K. B. 447. *Post*, 541.

(b) [1899] 2 Q. B. 124.

Chap. IX.

actually at work, excluding the time on strike. The County Court judge assented to this view, but was reversed in the Court of Appeal, on the ground that the admitted facts showed "not merely a break but an actual termination of" the contract. "The question," says Williams, L.J., (a) "is substantially whether the relation of master and servant existed during the whole of the period under consideration, and this applies equally to the lesser period mentioned in the second part of clause 1 (b), and to the period of twelve months in the first part. It seems to me that, if the state of work were such that during the whole twelve months the master could only give three days' work a week to his men, it would still be true within the meaning of this clause to say that the workmen had been employed during the whole of the twelve months, for the relation of master and servant would have existed during the whole time. The real question is whether there has been any break in that relation. To answer that question we may put this test. Are the facts such that we can assume that the workman, if called upon to work, will do so, or that the employer, if asked to give employment, will allow the man to work? If there is a period of time during which that could not be truly assumed, then the relation of master and servant will have come to an end, and it is impossible to deal with any period of time during which the master and servant have respectively ceased to be willing to give and accept employment."

Employment means continuous employment.

Jones v. Ocean Coal Co. was a case of incapacity resulting from injury, and the word "employment" in that connection was held to mean "continuous employment." The case of compensation for death was before the Court in *Appleby v. Horsley Co.*, (b) and "employment" there was

(a) *I. c.* at 129.

(b) [1899] 2 Q B 521

held to bear a precisely similar meaning. Deceased had been in the employment for about six months when he met with an accident which caused his absence from work for eleven months. At the end of that time he was taken on by his employers, not as a rivetter at £2 10s. a week as before, but in some other capacity, with wages of 30s. a week at which he remained at work for about eight months, when he was killed. It was suggested that, if the deceased was taken to have been in continuous employment for the three years preceding his death, the compensation would be his actual earnings - £177. This view was, however, not insisted on. In the Court of Appeal the employers—the appellants—argued that the only period that could be looked to was the period of continuous employment at 30s. a week. The respondents' point was that the periods at 30s. and 50s. were to be taken together. In the one case the sum payable would be £231, and in the other £259 15s. The Court of Appeal reversed the County Court judge, and held that the lesser sum only was payable.

The same question was discussed in *Hewlett v. Hepburn*.^{Hewlett v. Hepburn.} The workman was away from work eleven weeks. He returned without any fresh engagement, having left his tools on the job. The County Court judge found that there was a break in the employment. The Court of Appeal merely held that there was evidence on which he could so hold.

Williams v. Poulson (4) is to the same purport.^{Williams v. Poulson.} Between 5th March, 1898, and 25th January, 1899, the applicant had been working for the respondent during a portion of each week—except on four occasions, when he did not, for some reason not appearing—though sometimes he only worked one day in the week, and there was no continuous employment, the applicant being a casual dock

(a) 16 T. L. R. 56.

(b) 16 T. L. R. 42.

Chap IX. Incomer taken on by the job. The County Court judge took all the periods during which the applicant had worked for the respondent, and found that his total wages amounted to £38 13s 6d. This sum he divided by the number of weeks, and calculated the applicant's average weekly earnings to be about 15s. The award was thus 7s 6d. On appeal it was contended by the appellants that "where the workman had been employed only for a period less than a week by the employer, the amount of compensation should be calculated as if he had been employed by the same employer for at least two weeks at the same rate of daily wages that he was earning at the time of the accident." The Court of Appeal refused to interfere.

**Provision of the
Act of 1906.**

This case is provided for by the new enactment (a). The employment was "casual" and from the uncertainty of the earnings it was "impracticable at the date of the accident to compute the rate of remuneration." The method therefore to be adopted now is to arrive at "the average weekly amount which, during the twelve months previous to the accident, was being earned by a person employed at the same work by the same employer." Then "the personal element comes in. It will still be open to consider whether the individual workman is an average man or is above or below the average man" (b).

The case of *Willbous v. Paulson* was before the Court during the period that the decision of *Lysons v. Andrew Knowles & Sons, Ltd.* (c) in the Court of Appeal governed, deciding that where a workman had not been in the employment for a period of at least two weeks he could not obtain compensation, because there were no average weekly earnings. Lord McLaren, in *Southmol*, had decided the

(a) First Schedule, para (2) (a).

(b) Per Cozens-Hardy, M.R., *Ferry v. Wright*, 1908] 1 K. B. 452.

(c) [1900] 1 Q.B. 780.

century in *Russell v. M. Huskey*, (a) holding that an average Chap. IX.
could be arrived at where there was only one week's
employment. The Scotch view was maintained in the
House of Lords, (b) and the Court of Appeal was overruled.
Employment, even for a day, was held to entitle the work-
man. The narrow meaning put upon the word "average"
by the Court of Appeal was repudiated. "I think, in
ordinary popular parlance," says the Lord Chancellor, (c)
"when you talk of a man, if he has earned irregular wages,
whether unequal wages or equal wages, you would say,
speaking of a yearly servant that on the average he got so
much a week or so much a month, as the case might be. I
think that it was in that popular sense, taking one day with
another, or one week with another, that the Legislature used
the word, and I think it is what everybody would under-
stand by 'average,' that his earnings were so much—not
his agreed earnings by contract, there it would be definite—
that if a man was only employed at irregular intervals, or at
irregular amounts, you were to get at what the average was
by putting them together and striking an average so as to
attend a test of the weekly sum to be paid." The proviso to
par 2 (a) now gives a means of arriving at an average where
the facts of the injured workmen's earnings are insufficient
of themselves to give a rule of computation.

House of Lords'
view of average
weekly wages

While the preceding case was yet on its way to the House
of Lords, *Hathaway v. Argus Printing Co.* was decided. (d)
This was a claim in respect of casual work done for other
employers, also for the contract employer. The applicant
had a contract to work on the nights of Thursday and Friday
in each week, at 8s. 8d. a night. In the third week of the
employment he was injured. The County Court judge

*Hathaway v.
Argus Printing
Co.*

(a) 2 F. 1312.
(c) L. c. at 87.

(b) [1901] A. C. 79.
(d) [1901] 1 K. B. 96.

Chap IX awarded 8s 8d. There were cross appeals. The workman contended that the money paid for work done for other employers, or casual work for the same employer, should be taken into account. The employers contended that casual employment was not within the Act. Both appeals were unsuccessful. As to the workman's contention, it was said: "To enable one to say that a series of short periods should be taken together and treated as a continuous term there must be some *act* to join them. There must be some contract, express or implied, which raises a reasonable expectation of continuity in the employment. In the absence of that *act*, casual engagements on non-contract days do not constitute one continuous employment, for they are not bound together. . . . I do not think that the applicant could be said to have been in the employment of the same employers so far as these casual jobs are concerned, so that they could be treated as a continuous employment." (a)

As to the employers' contention, the answer was, "To constitute continuous employment it is not necessary that it should have extended to every day of the week. . . . The agreement was to serve two days in every week for a period extending beyond two weeks, and under those circumstances I can see no difficulty in arriving at the average weekly earnings." (b)

Casual earnings These casual earnings are probably within the third class noticed by *Cuzens-Harley, M R*, in *Penn v. Spiers & Poul, Ltd.*, to be as "casual, sporadic, and trifling in amount," which ought not to be brought into account in estimating the average weekly earnings. There are other earnings which that case shows are not to be neglected in this estimation.

(a) *L. c.* per Collins, L.J., at 100.

(b) *L. c.* per Stirling, L.J., at 101.

(c) [1906] 1 K. B. 766 at 770.

The principle of *Hathaway v. Argus Printing Co.* cannot be legitimately extended to rule out "overtime" from being in the same employment. "Overtime" is merely an incident attaching to the employment, a development or extension of it, continuing all the incidents of the employment, its rights and its liabilities, but increasing its remuneration and the period the workman is exposed to its incidents. Chap IX.

This was held by the Court of Appeal in *Coles v. Belford Smith & Co., Ltd.* where the County Court judge came to the "conclusion on the evidence that the nature of the employment was such that the workman would be called on from time to time to work overtime, and it was understood that he would do so when required, and therefore his employment in that way was not merely casual, and also that the days on which he worked ought not to be regarded each as a separate, casual day employment but that there was an underlying presumption that the employment would continue until the completion of the work." The duty of the Court under the Act of 1906 is "to ascertain what remuneration the workman would receive in a normal week in the employment in which he was engaged at the time of the accident," and the Act "gives it freedom to do so in the manner best calculated to arrive at a fair result." (a)

In the case of a miner killed before he had earned any wages under the Act of 1897 his widow was held entitled to £150. Under the present Act her "solatium" would be the same (c).

The Scotch decision of *Doyle v. Benthie & Sons (d)* held that, where the injuries do not immediately incapacitate a workman, who accordingly returns to work after the

(a) [1903] 1 K. B. 841, 847.

(b) Per Viscount Hardv, *Perry v. Wright*, [1908] 1 K. B. 411 at 456.

(c) *Leonard v. Baird & Co.*, 35 Sc. L. R. 649.

(d) 2 F. 1166.

Where effects of accident not immediate.

Chap IX. accident, but is ultimately obliged to give over work, the earnings during the period between the accident and his incapacitation may be taken into account. This might well be in the man's favour, for it would be evidence of what his earnings would be if uninjured; but certainly not against him, for the lesser wages he might take would be the consequence of the injury, which could not be held to diminish the liability. Williams, L.J., touches the point in *Appleby v. Horsley & Co. Ltd.* "Suppose the case of a man in an employment at a high rate of wages, and that during that employment he meets with an accident which results in his death, but not for some little time, and that meanwhile his master gives him some employment, not necessarily the same, but enabling him to earn some wages—in such a case I do not feel sure that the employment with which we should have to deal would not be the employment up to the time of the accident causing the death, and I do not wish to give any opinion as to whether the tribunal assessing the compensation should in such a case consider the employment at the lesser wage."

Acceptance of
compensation
prima facie
evidence of
agreement

By sec. 4, sub-sec. 3, the question of compensation is contemplated as one that may be settled by agreement; and the acceptance of compensation is *prima facie* evidence of this and a bar to a further claim. *ib.*

By First Sched. (1), art. (1), (c) it is provided that, where compensation is awarded for a death, "the amount of any weekly payments made under this Act, and any lump sum paid in redemption thereof, shall be deducted" from the sum awarded. This would not include any sum in redemption paid to the workman before the expiration of the six

(a) [1899] 2 Q. B. at 526

(b) See Proposition VIII, Chapter V, Part I, *ante*, 116

(c) *Ante* 25.

months under par (17). For such compensation is not paid under the Act, but would be a gratuitous payment. The Act only allows redemption under named conditions. If in circumstances to which the Act applies something is done not allowed by the Act, the right of dependants cannot be thus defeated. The fatal accident has deprived them of the support on which they depended and, in the event they come under the benefits of the Act, which cannot be alienated from them without their concurrence.

The occasion for making a deduction arises when an applicant has obtained compensation for disablement and subsequently dies, when his dependants may apparently go for a new arbitration and recover within the limits of £150 and £300, less the amount of any weekly payments the deceased may have had made to him "under this Act." Sums paid apart from the Act would not be reckoned in account. The reasoning in *Read v. Great Eastern Ry. Co.* (a) does not appear applicable. The compensation is not for negligence, but a sum in aid of dependants. (b)

"I think," says Lord Alverstone (C.J.), (c) "that a workman who takes the benefit of the Act on the ground of his incapacity to earn wages and obtains compensation based on the footing of those wages, cannot turn round and say that he is entitled to the balance of his wages during the time in which he has been disabled from work and receiving compensation."

Another contention was advanced in *Houghton v. Sutton Heath and Jan Green Collieries Co.* (d) expenses out of wages.

The wages of the deceased were £1 10s. 10d. at the time of the accident. The employers were in the habit

(a) L. R. 3 Q. B. 555. Cp. *O'Keefe v. Lovatt*, 18 T. L. R. 57.

(b) *Id.*, 326.

(c) *Elliot v. Luggens*, [1902] 2 K. B. 84, 86.

(d) [1901] 1 K. B. 98.

Chap IX

of supplying oil for the lamps with which the miners worked, and it was the rule of the colliery that 6d. should be deducted weekly in respect thereof. The County Court judge's award was made irrespective of this deduction, and this was sustained in the Court of Appeal, on the ground that the workman's wages are the full amount agreed to be paid by the employers, and not that amount subject to deductions. "I fail to see on what principle," says Collins L.J. (c) "a distinction can be drawn between light, by which a man can see the coal on which he is to work, and implements, by means of which he can cut it."

Miner assisted
by son who was
unpaid.

A similar decision was come to in the Scotch case of Nelson v. Kerr & Mitchell (b). A miner was assisted by his son, who acted as drawer, but to whom he paid no wages, though the usual wages for a boy so assisting were 2s. 6d. a day. No reduction was allowed in respect of the work done by the boy.

Abram Coal Co.
v. Southern

Houghton's case was approved by the House of Lords in Abram Coal Co. v. Southern (a). Lord Macnaghten there defines "earnings" as "the full sum for which the man is engaged to work," when he comes to it properly equipped according to the general understanding and practice in the particular trade. Thus, where a deduction is made by agreement from the wages of a collier in respect of cleaning lamps, supplying oil, sharpening picks, and checking weights, his earnings for the purpose of estimating compensation are to be reckoned at the full amount for which the man is engaged to work, without these deductions.

Midland Ry. Co.
v. Sharpe.

The Converse case came before the House of Lords in Midland Ry. Co. v. Sharpe. (d). Respondent's husband was

(a) L. C. at 95.

(b) 38 Sc. L. R. 645.

(c) [1903] A. C. 306.

(d) [1904] A. C. 349.

employed as a railway guard. In addition to his wages he received a fixed sum whenever his duties as guard required him to lodge away from home. The question was whether these fixed sums were "earnings." Lord Robertson put the matter thus: "The contract with this guard is that, plus what is called his wages, he is entitled to so much for each night he is away from home, and no inquiry is made whether that sum has been spent on board and lodging or spent at all. This being so, it seems to me that not the less because the purpose of these extra payments was to meet the cost of board and lodging has this man a right to the money and not the less because they bear the name 'allowances' does the guard earn them each time he, on the service of his employers, has to spend the night away from home. And if he earns them they are earnings."

This principle was applied to the case of a man who was employed in a position where he had to appear in uniform, but the uniform was lent him by his employers. The Court held that "the privilege of being given the use of such an uniform by the employers, and thereby relieved from the necessity of paying for it out of his own pocket, must be considered as an additional emolument to be taken into account in estimating his earnings" (a).

These decisions are now subject to the enactment in par. (2)(d) of the First Schedule. Where the employer has been accustomed to pay to the workman a sum to cover any special expenses entailed on him by the nature of his employment, the sum so paid shall not be reckoned as part of the earnings. That this provision is inconsistent with the decision in *Midland Ry. Co. v. Shurpe* (c) is clear;

(a) *Id.* at 351.

(b) *Per* Cozens-Hardy, L.J., *G. N. Ry. v. Dawson*, [1905] 1 K. B. 331, 335, *Dothie v. Robert Macandrew & Co.* [1904] 1 K. B. 503, *Rosebery v. Bowring & Co.* [1908] 2 K. B. 104.

(c) [1904] A. C. 349.

G. N. Ry. v. Dawson

Chap. IX. the extent that it actually goes is, however, not so plain. — The expenses not included are to be "special expenses entailed on him [the workman] by the nature of his employment." This would seem to confine the allowance to expenses made to the workman for some purpose special to himself and not to the employment. The allowance must be exceptional and not common to all engaged in the same employment, or at least the employment must be exceptional or possibly individual. • For example, to take the illustration used by Smith, M.R., in *Houghton v. Sutton Heath and Lea Green Collieries Co. (a)* "In order to do his work he [the workman] had to supply himself with lamp oil, and in the same way he had to supply himself with food clothes, and other things which he required to enable him to do his work. Are his earnings any the less quoad what he receives from his employers because he has to meet certain expenses? ' It is not to be assumed that items of this sort are "special expenses entailed" by the nature of the employment. On the contrary, they are general, universal—even to the lamp oil. A special expense in the case, say, of a manager would be the sum allowed for travelling to London to give evidence before a Parliamentary Committee, or attending an exhibition of mechanical improvements with a view to their introduction to the mine.

*Houghton v.
Sutton Heath and
Lea Green
Collieries Co.*

*Backhouse v.
Armstrong,
Whitworth & Co.*

The case of *Backhouse v. Armstrong, Whitworth & Co., Ltd.*, (b) may be noticed in this connection. A workman of the respondents was injured. It was agreed that he was entitled to 10s. 6d. a week, unless a deduction could be made on account of 8s. a week due to him for the first thirteen weeks and 5s. weekly for the next thirteen, from a mutual aid fund to which he compulsorily contributed,

(a) [1901] 1 K. B. 93, 94.

(b) Reported very shortly in a note 106 *Law Times* newspaper, 264.

and to which the employers contributed £100 a year to workmen's subscriptions of £1,100, made up of 2*l.* a week per man, retained by the firm as treasurers of the fund. The submission was that this was a deduction under a contract, and never became wages at all; it was the firm's money. The arbitrator rightly held that this was not so. On fulfilling the conditions, entirely irrespective of the Act, the workman became entitled. "This Act created a new liability of the employer, and any payment a man would be entitled to in ordinary sickness should not be taken to relieve an employer in case of accident" (a).

Chap IX.

By the First Schedule (2)(a) average weekly earnings are to be computed in the way (whatever it may be) best calculated to give the rate per week at which the workman was being remunerated.

No. 1 method of computing average weekly earnings

But where

- (1) through the shortness of time during which the workman has been in the employment;
- (2) through the casual nature of the employment; or,
- (3) through the terms of the employment,

it is impracticable at the date of the accident to compute the rate of remuneration of the injured man, it must be estimated according to the method of the section.

If the case of the individual man is difficult to deal with by reason of any of the three causes above enumerated, a typical workman is to be taken as the standard of compensation, and the compensation is to be measured by his case, who is to be in the same employment if possible, if not, who is to be employed in the same district.

The Court of Appeal considered the principles involved

(a) As to items that may not be included, see *Pomphrey v. Southwark Press*, [1901] 1 K. B. 86. *Id.*, 568.

Chap. IX. in these paragraphs (a) of the schedule in a group of cases reported under the leading name of *Perry v Wright* (b)

Paragraph 1 (a) and (b) of the First Schedule to the Act of 1906 is an exact repetition of paragraph 1 of the First Schedule of the earlier Act.

Paragraph 2 is a new section appropriate for the interpretation of paragraph 1. By it a much greater elasticity is given to the method of arriving at the amount of a workman's "earnings" or "average weekly earnings" and "whether the task [of computing] is 'unpracticable' must be decided at the date of the accident", and if so an estimate must be made, based "on the average weekly amount which during the twelve months previous to the accident was being earned by a person in the same grade, employed at the same work by the same employer, or if there is no person so employed by a person in the same grade employed in the same class of employment" (c).

"In my opinion," says Fletcher Moulton, L.J., (d) "the term 'average weekly earnings' signifies broadly the average earnings which the workman would make in a normal week if employed on the terms prevailing before and up to the time of the accident." This he explains thus: (e) "Let us assume that workmen are paid by time, and are in the receipt of £2 a week at a mill that is closed for holidays for two weeks in the year. The wages earned by such workmen in the year are represented by fifty times £2, and not fifty-two times of .

entitled. That this is the proper notion is evident from par. (15) of the schedule, and pars. (16) and (17) of the Second Schedule.

(f) 1 K B 441.

thirteen w. Jones-Hardy, M.R., *Perry v Wright*, [1908] 1 K B at 451. In mutual gains borrowed from s. 3 of the Employers' Liability Act, 1880.

(a) [1901] 1 K B 148; [1908] 1 K B 450.

(b) Reported very

£2, and the employer has a right to claim that this shall be recognized in calculating the average weekly earnings just as much as any other lack of continuity in employment which is inherent in the employment itself. But what is not, in my opinion, fair or in accordance with the Act is to allow the calculation of the average weekly earnings of the particular workmen to be affected by the question whether or not a larger or smaller amount of these enforced stoppages occurs in the relevant period which furnishes the material for the average. For instance, two workmen in the same employment at the same wages would, in my opinion, be entitled to have their average weekly earnings estimated at the same figure, even though the Wakes Week (a) occurred in the period during which the one had been in the master's employment and did not so occur in the case of the other. The latter would be entitled to have regard taken to the fact that the average weekly earnings in such employ were somewhat less than the £2, by reason of the fact that only fifty weeks were worked out of the fifty-two of which a year consists, but the rate of remuneration so arrived at must be applied equally to the case of each of the two workmen."

Chap. IX.

But by par. (1) (a) (i) and (ii) the "average weekly earnings" are to be those earned "in the employment of the same employer"; and by par. 2 (c) employment by the same employer "shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause." The first word needing explanation in this connection is "grade." "I think," says Cozens-Hardy, M.R., (b) "it refers to the particular rank in the industrial hierarchy

employment by the same employer defined.

(a) A period in Janca-shire during which works are stopped and perforce workmen must be idle.

(b) *Perry v. Wright*, [1908] 1 K. B. 451

Chap. IX occupied by the workman, such as shepherd, cutter, or
Grade. common labourer on a farm, or mason, or bricklayers, or
 bricklayer's labourer in the building trade, and not his
 greater or less excellence in that rank. It is a question of
 fact whether there is any 'grade' to which the workman
 belongs. If there is no grade an estimate must never-
 theless be made."

"That word [grade] does not involve or depend upon
 individual characteristics. Each grade may, and indeed
 must, have good and bad members. The good and the bad
 are not two grades." (a) If a man is working in any of the
 circumstances classified in the opening words of the proviso
 to par. 2 (a) (b) so that it is "impracticable at the date of
 the accident to compute the rate of remuneration" he has
 been receiving, the first thing is to find the grade of labour
 in which he has been working, next, what are the average
 wages in that grade. These are not binding on the
 arbitrator. "The personal element then comes in. It will
 still be open to consider whether the individual workman is
 an average man or is above or below an average man. This
 must be so where men in a particular grade are employed
 in piece work. You cannot reject evidence of the skill and
 efficiency of the individual workman" (c). The object of
 this classification of exceptions is not "to depart from the
 fundamental principles," but to give greater freedom to
 the Courts in the admission of evidence in cases where
 the ordinary modes of computing the average weekly
 earnings fail: "the facts which the Courts may thus take
 cognizance of are to do 'a grade and not a letter'" (d).

Employment
 by the same
 employer.

Paragraph 2 (c) defines "employment by the same

(a) *L. c.*, 453.

(b) *Ante*, 327.

(c) *Per Owen-Jones, M R*, *L. c.*, 452.

(d) *Per Fletcher Moulton, L.J.*, *L. c.*, 458.

employer." We have already set out the words. Their meaning, as expanded by *Gozens-Hardy, W.R.* (a) is "Any step up or step down from one grade to another is to be regarded as commencing a fresh employment. But in calculating any of the periods mentioned in par (1), you are to disregard absence due to illness or to causes beyond the control of the workman, and to reckon the employment as continuous, notwithstanding any such absence. This will be only a presumption, which may be rebutted by evidence that the workman was in fact discharged on the ground of such absence and subsequently re-engaged." *Fletcher Monilton, Change of grade.* L.J. (b) expands this thus: "I must not be understood as saying that an increase of wages will necessarily have the effect of excluding from the calculation of this average the weeks in which the lower rate of wages has obtained, because a man's wages may rise or fall without any change of grade taking place, but if there has been a change of grade, they must be so excluded. For instance, if an ordinary seaman has been promoted to be an able-bodied seaman, and continues in that grade up to the date of the accident, par (2) (c) excludes from the calculation of his average weekly earnings the period during which he has been an ordinary seaman."

These principles were illustrated by the cases before the *Perry v. Wright* Court. In *Perry v. Wright* (c) the applicant was a casual dock labourer who had worked two days at the date of the accident. He had no regular employment, but worked sometimes for one employer, sometimes for another, as a job turned up.

The County Court judge found that it was "impracticable" to compute the rate of his remuneration. He found

(a) *L. C.*, 453.

(b) *L. C.*, 457.

(c) [1908] 1 K. B. 441.

Chap. IX. that there were "no definite grades" other than good and bad; that the wages of the former averaged 30s. per week, and the latter about 15s.; that applicant was a man of poor physique owing to drink, and did not stick to his work. So he graded him bad and awarded 15s. a week.

The decision of the Court of Appeal was that the County Court judge was not entitled to do this, that bad and good were not grades, that the only relevant grade in this case was that of casual dock labourers as a whole, whose average earnings the County Court judge might consider, yet that after ascertaining what was the average earnings of a casual dock labourer in that district, he is entitled to consider what on that basis is a fair estimate of the average weekly earnings of the workman in question—in other words, how nearly his circumstances approach those of the average labourer. (a) If there are circumstances which differentiate the wages of the individual from those of his grade, the arbitrator is bound to give effect to it. The case was referred back. History does not report what happened. Most probably the County Court judge amended his reasoning and confirmed his conclusion.

Cain v. Frederick Leyland & Co.

The next case is *Cain v. Frederick Leyland & Co.* (b) Applicant's husband, a casual shipwright, met with a fatal accident in his employment. The standard union rate of wages for shipwrights was 7s. a day. The County Court judge found £1 10s. a week to be "the average weekly amount which during the twelve months previous to the accident was being earned by what I may call an average good shipwright casually employed in the same district as the deceased." Compensation was awarded

(a) *Per Fletcher Moulton, L.J., l. c., 464*

(b) [1906] 1 K. B. 444.

on this basis. This was affirmed. "He [the County Court judge] has not held himself bound as matter of law to adopt the average wages as a basis. But, there being no evidence to show that Sam [the appellant's husband] was either better or worse than an average man, he has thought fit to adopt that basis." (a)

Chap. IX.

In *Barley v. G. H. Kenworthy, Ltd.* (b) appellant had been in the employment for more than twelve months when he was injured, and his earnings had amounted during that time to £83 2 17. He was paid by the piece and not by time. In the course of the year there were stoppages, (a) by reason of a canal having burst its bank; (b) during the Wakes Week &c.; (c) by reason of accidents to boiler and machinery; (d) on Bank Holidays. The County Court judge divided the earnings by fifty-two and awarded compensation during incapacity at the rate of 15s. 11½d. The method adopted by the County Court judge was disapproved by the Court of Appeal. "Assume for the sake of clearness that the total of the stoppages from recognized holidays amount to two weeks, and that the remainder of the interruptions from accidents and other causes amount to one week." "The right way of proceeding is to say that the sum total of the earnings, namely, £83 2s. 17d., was earned by forty-nine weeks' work, and the average per week thus obtained will give the average wages earned in a week of full work. But there are only fifty weeks of full work in the year, and therefore the average earnings in a week would be less than the figure so obtained by one twenty-sixth part, or about 4 per cent. In other words, the earnings in a week of full work are to that extent higher than the average weekly earnings in the employment, because there is incident to it

(a) *Per Coryn-Hardy, M.R., l.c.*, 451. (b) [1908] 1 K. B. 447.

(c) *See note, ante*, 537.

Chap IX. an enforced idleness of two weeks in the year. The week during which the workman was absent from work on account of breakdown in the works stands in a different position. If such interruptions were a normal and recognized incident "they might be treated in the same way as the stoppages." "Otherwise . . . accidental interruptions of that kind ought not to be considered as affecting the rate of remuneration which the workman was receiving." The sum of £65 11½*s.* was agreed to be the correct basis of calculation (10).

Gough &
Crawshaw
Brothers.

Gough & Crawshaw Brothers(11) is the fourth of this series of cases. Applicant's husband met with two accidents. After the first he received half the amount of difference between £1 11*s.* 6*d.*, the wages he was earning per week when injured, and the average earnings in a light employment which he accepted after the accident, provided such difference did not exceed £5 8*s.* per week, which was the statutory amount of the compensation. By the second accident he was killed.

The County Court judge found that the deceased was not working as a collier; that he was employed to carry batteries, and that that was a grade of work, and he made his award on the basis of the average weekly sum paid as wages for that work. The Court of Appeal upheld the County Court judge. They could not say "as matter of law that there cannot be a grade of battery earners, and that he must have retained his old grade of a collier. If so, the basis of compensation was properly taken on the footing of his employment in that grade of a battery carrier from December 12 [the date of his accepting the light employment] until his death. It was somewhat faintly suggested that the money

(10) As to the effect of public holidays in a contract of employment, see *Whitcombe & Tombs v. Taylor*, 27 N. Z. L. R. 287.

(11) [1908] 1 K. B. 448.

payable in respect of the first accident ought to be added to his earnings. But compensation money is one thing and earnings are another thing." (a) Chap. IX.

The second sub-section of par. 2 (2) (b) deals with "concurrent contracts." Though the nature of a concurrent contract has been several times discussed in County Courts, no authoritative decision seems yet to have been elicited as to its connotation, and one must consider the matter on principle alone.

If a workman enters into contracts with different employers to give up a portion of his time to service with one, and another portion to service with another, and the two contracts coexist and extend over the same period of time, he manifestly has entered into concurrent contracts of service with two, or it may be with more employers. The average weekly earnings of the workman in the event of his being injured in either employment are then to be computed as if his aggregated earnings were his earnings in the employment in which he was working at the time of the accident.

But take the case of a bricklayer who after his day's work increases his earnings by shoe-blackening or paper-selling. Here the earnings out of hours are not under an employer. His day's work is under contract, not so his evening's work. There are not concurrent contracts of service. He cannot aggregate the earnings of his two occupations. Suppose, again, the case of a casual labourer at the docks who also earns money after hours as a watchman or other night occupation. According to the practice at the docks he does not work under a contract, he only has a preference—his ticket, which assigns his grade and the extent of his preference. He comes under the benefits of the Act by reason of the proviso to par. (2) (a) of the

(a) *Per Cozens-Hardy, M.R., l. c., 454.*

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Workmen's Compensation Act, 1906

Chap. IX. First Schedule, and has the compensation to which he is entitled assigned to him by the method indicated there; but there is no contract to employ him, and after his day's work is done he has no legal claim to another. Consequently when he is injured he does not come within par. 2 (b), for the simple reason that he has not "entered into concurrent contracts of service with two" employers. He is not enabled to aggregate his earnings.

Again, let us take our bricklayer, who at evenings is willing to clean windows. If he has a running contract to do this, in the event of being injured while working as a bricklayer, he can claim compensation based on his aggregate earnings as window-cleaner and bricklayer. Nay, more—he can claim for an injury received while working as a window-cleaner from his evening employer, on the basis of his aggregate earnings as window-cleaner and bricklayer. Yet once more—if he is employed now and again by a window-cleaning company, however irregular and uncertain his earnings in this respect, he may yet make them matter of claim when he is injured in his capacity as window cleaner on the basis of the proviso to par. (2) (a), but not as bricklayer; for there are not concurrent contracts; there is one contract and an expectation.

But if his evening employer is not engaged in the window-cleaning business, but casually gives him a job, (a) he cannot obtain compensation from such employer, nor may he aggregate his earnings with those received as bricklayer in a claim made against his employer for an injury received in his employment as a bricklayer; since he is "a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business," and is excepted from the definition of

(a) *Hill v. Begg*, [1906] 2 K. B. 802, 24 T. L. R. 711.

workman(a) in the Act, and it follows that work, that is not of a character to bring a man under the Act, when done by one who is on other accounts under the Act, is not to be reckoned in assessing the compensation to which he is entitled.

But our bricklayer with his day contract to work may get a job in an evening, say, to distribute bills. He may be well known for his handiness, and may have many employers. But his evening employment does not bring him within par (2) (b), so far as his bricklaying contract goes he has not entered into concurrent contracts of service with two or more employers. He would do so were his bill-distributing occupation for successive or even intermittent periods. The reasoning as to this seems satisfactory. If the bricklayer were injured in the day preceding his getting his evening job, at the time of the accident he would have no other contract in existence; and if the evening work had been done previously to the accident, still at the time of the accident there would be no other contract that could in any reasonable sense be called concurrent. In the converse case, if the injury to the bricklayer is done while he is distributing bills in the way of his then employer's business, there does not seem any reason why he should not aggregate his bricklaying earnings to his earnings as bill distributor. At the time of the accident he is working as bill distributor under a contract, and there is nothing concurrently with that his contract for his day work at bricklaying. If this is so the provision may be a drawback to the employment of a diligent man.

The case of a jobbing gardener has been put. The illustration is first of all defective from an ambiguity in the statement. A jobbing gardener (in London at least) very often employs a number of men, whom he detaches to

(a) S. 18.

Chap IX. his various jobs. In these circumstances any job need not be performed personally; the contract is not a contract of service. The Act does not render a householder who sends for a plumber or glazier or a jobbing gardener in this sense liable for the injuries sustained either by master or man who are thus employed to work for him *(a)*. Take, however, the case of a working gardener, but not employing journey-men, since if he employs men there is a danger that the employment will cease to be a contract of service—and will be outside the Act. Such a man would be entitled to add together his earnings from his various running contracts of service, but not his casual jobs, for at the time of an accident these would not be subsisting contracts. But in the event of cutting himself with his mower while working for A, he would be allowed to aggregate his earnings from contracts with B, C, and D in arriving at the compensation payable by A; the contracts would be concurrent, but he would not be allowed to bring into the computation any stray jobs he might light upon while holding himself out for hire in the market-place, or where ever he renals his services.

Dowhurst v. Mather.

Dowhurst v. Mather (b) is a typical case of a concurrent contract. The washerwoman who was engaged on "every Friday and every other Tuesday" in that case, worked the rest of the week with other employers, and her collective earnings came to 15/- a week. When it was decided that she was a workman working under a contract and not doing merely casual jobs, the whole of the work she did weekly *under contract* became capable of aggregation, and she was entitled to recover up to half her weekly earnings.

The case of several persons in an office or set of chambers entitled to the services of clerks may also be put. The answer to this depends on the contract of service. If

(a) S. 4 (1). *Ante*, 305. (b) [1908] 2 K. B. 754; 24 T. L. B. 619.

the clerk is engaged by one, and the others have the right by reason of their contracts with their landlord, perhaps, to his services, the service is only one, and any proceeding must be brought against the person with whom the clerk has the service. The aggregate earnings from the whole number would be the sum on which compensation is based. Again, the contract may be with all the principals in the office, then the clerk's claim would be against that member to whom he is acting at the time of the injury. The basis of compensation would still be the aggregate earnings;—in this instance, because there are concurrent contracts,—in the former case because the clerk's earnings from all the sources go to make the average weekly earnings.

Paragraph (2) (c) is merely a definition already considered and indicating how to arrive at the normal amount of the wages of the employment previously to entering upon the individual circumstances of the injured workman, which would determine whether the compensation to be assigned by him should deflect either in the way of excess or defect from the normal amount of his grade.

Paragraph (2) (d) we have already discussed in connection with the class of cases that are affected by it (a).

(iv) *Partial Dependence, (b)*

In the case of total dependency the functions of the arbitrator are merely to arrive at a sum of which the data are immutable. In the cases now to be considered the discretion of the arbitrator is, within the limits indicated by the Act, immutable. The amount payable amongst partial dependants is, as in the former case, a maximum of £300, but there is no minimum fixed. The compensation,

(a) *Ante*, 533.

(b) First Schedule, par. (1) (a) (ii). *Ante*, 526.

Workmen's Compensation Act, 1906

Chap. IX. — unless fixed by agreement, is to be "reasonable and proportionate to the injury to the said dependants;" (a)

The words in sec. 2 of Lord Campbell's Act are "proportioned to the injury." Under these words it has been decided that —

- (1) The compensation must be for pecuniary loss only; (b) and
- (2) The expenses of the deceased's funeral and mourning cannot be recovered (c)

As to the former of these heads, the compensation is, as we have seen, limited by the present Act. As to the latter, where there is no compensation payable, expenses are recoverable to the extent of £10. The sum recovered in case of death is not protected by par. 19 of the First Schedule (d).

The proportion would not be measured by the workman's neglect of his obligations. For example, an employer could not successfully contend that a deceased workman had starved his wife, and that therefore her compensation under the Act was *pro tanto* diminished. The employer's obligation would be measured by the wife's right, not by her laxity in enforcing it.

The word "proportionate," however, probably has reference to the conflicting claims *inter se* of dependants, as for instance between a widow and elder and younger children.

Pecuniary
benefit.

If, in the opinion of the arbitrator, there is small injury to the partially dependent, he has an absolute discretion to award any sum down to the smallest coin of the realm. (e) The subject of inquiry that he has to set before himself is,

(a) *Ante*, 326. Cp. Props. III, IV, and VII, Chapter V, Part I. *Ante*, 109 *et seqq*.

(b) *Ante*, 109.

(c) *Ante*, 105.

(d) *Ante*, 834.

(e) Cp. *Hildesheim v. W. & F. Faulkner, Ltd.*, [1901] 2 Ch. 552.

whether there was sufficient present pecuniary benefit, or the anticipation of future pecuniary benefit, to constitute the applicants in part dependent on the earnings of the deceased (a)

In *Mann Colliery Co. v. Davies*, (b) Lord Davey quotes with approval the County Court judge: "I think it is clear that as the boy did give his parents his wages, and the parents did receive and depend on their son's wages as a part of their income or means of living, the question is answered 'Yes.' The arbitrator has in a case of that sort to say what the benefit is." Again the fact that the person claiming to be a "dependant" of a workman killed by accident *can* maintain himself does not of itself debar him from maintaining a claim as a dependant (c)

Question for arbitrator.

Compensation in the case of partial dependency is to be assessed on the same principle as in the case of total dependency, so that it is not permissible to arrive at his earnings (d) to deduct the cost of living of the deceased workman.

Any question as to who is a dependant shall in default of agreement be settled by arbitration under the Act, or, if not so settled before payment into Court under this schedule, (e) may be settled by the County Court. Total and partial dependants may alike claim and the compensation shall be apportioned amongst them (f). The Scotch case of *Fagan v. Murdoch* (g) is thus superseded even in Scotland.

(a) *Sommons v. White Brothers*, 1891 1 Q. B. 100.

(b) [1900] A. C. 212.

(c) *Cle. Leitch & Sons v. Butler*, 39 Sc. L. R. 118.

(d) *Howells v. Vivian & Sons*, 48 T. L. R. 36, *French v. Underwood*, 19 T. L. R. 116.

(e) *Osmond v. Campbell & Harrison, Ltd.*, [1905] 2 K. B. 852.

(f) First Schedule, par. (5).

(g) First Schedule, par. (8).

(h) 1 F. 1179.

Chap. IX

Funeral
expenses

In *Bevan v. Crawshaw Brothers, Ltd.*, (a) the contention was that under First Schedule (1) (ii) (ii) no award could be made to include funeral expenses.

The only case, it was said, in which the Act admits the funeral expenses of a deceased workman as an element of compensation, is that in which the workman leaves no dependants. The compensation payable was to be "reasonable and proportionate to the injury" words suggested by the wording of Lord Campbell's Act, under which it had been decided that there was no recovery for funeral expenses. The Court of Appeal, however, would not admit the analogy (b). It was pointed out that par. (1) (ii) (ii) seems to assume that where the deceased workman leaves no dependants, his representatives will have to pay those expenses, and that they ought to be reimbursed the amount of them. "Why should these expenses be repayable in the case where the deceased workman leaves no dependants, and yet should not be taken into consideration in determining the sum reasonable and proportionate to the injury to the dependants to be paid as compensation under sub-sec. (ii)? It seems impossible to suggest any reason why this should be intended. The statute has fixed a maximum amount in the case of compensation to dependants on a deceased workman, and it would, no doubt, not be competent for the arbitrator under the Act to award anything in addition to the maximum amount by way of funeral expenses; but the Act itself shows that it contemplates funeral expenses as a subject of compensation, and I do not see anything to prevent the arbitrator from taking them into account in considering what sum he shall award under sub-sec. (ii) within the maximum." (c)

(a) [1903] 1 K. B. 25, followed in *Gourlay v. Murray*, 15 Sc. L. R. 577.

(b) *Dalton v. South-Eastern Ry. Co.*, 4 O. B. (N. S.) 296.

(c) Per Collins, M.R., *Bevan v. Crawshaw Brothers, Ltd.*, [1903] 1 K. B. at 29.

(c) *Where no Dependants are Left (a)*

Chap IX.

"Dependants" in this case covers both classes of wholly dependent and partially dependent where there are dependants of no kind whatsoever. Then the employer is to pay the reasonable expenses of medical attendance and burial, in all they are not to exceed ten pounds (b)

In the event of a person dying from the effect of an accident within the Act, and leaving no dependants, difficulty may arise as to who is entitled to put the Act in operation to recover expenses of medical attendance. The legal personal representative who may have rendered himself liable for them could of course recover. But supposing there is none, a contract would certainly be implied with the deceased, whether adult or minor, *to* pay the expenses incurred, and by taking out administration to the deceased a claim could be made for it by the person to whom it was due. Still, in a case where no more than £10 can be recovered, both for the medical expenses and the expenses of burial, a right to administration would be but a profitless privilege, and the only valuable right would be that of going directly against the employer.

The concluding words of the definition of "workman," (1) however, meet this difficulty by providing that when the workman is dead the word "workman" in the Act shall include "his legal personal representative, or his dependants or other person to whom or for whose benefit compensation is payable." While par. (5) of the First Schedule (c) provides that if the workman leaves no dependants and if

(a) First Schedule, par. (1) (a), (a) *Ante*, 326.

(b) As to the meaning of "reasonable," see *ante*, 191.

(c) Medical attendance is a necessity for which a child may contract. *Inf. Liable*, 1724, § 269.

(d) §, 13, *ante*, 120.

(e) *Ante*, 329.

Chap. IX. — so agreed the payment in case of death shall be made either "to his legal personal representative, or, if he has no such representative, to the person to whom the expenses of medical attendance and burial are due" (*a*)

Funeral expenses

With regard to funeral expenses, they were always a first charge on assets, and payable even in priority to Crown debts. Unless payment is made under this proviso the payment in the case of death is to be made into the County Court and invested (*b*) or otherwise dealt with, as the Court in its discretion thinks fit, for the benefit of the persons entitled thereto under the Act.

In the case of a master, seaman, or apprentice who dies leaving no dependants, no compensation is payable if the ship-owner is liable for the expenses of burial under the Merchant Shipping Act, 1894, (*c*) or which the provisions of the Merchant Shipping Act, 1905 (*d*) see 31 are now substituted.

12) SUSPENSION TO A WORKMAN INJURED

1A) *Totally Disabled* (*e*)

Weekly payment during incapacity.

Where a workman is totally disabled in circumstances which entitle him to compensation under the Act, he is entitled to receive a weekly payment during incapacity, *if* not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long in the same employment; but if not, then for any less period

(*a*) Cp. note (*b*) to s. 1 of Lord Campbell's Act, *ante*, 101.

(*b*) *Inf.*, 837.

(*c*) 57 & 58 Vict. c. 615, s. 207.

(*d*) 6 Edw. VII. c. 48, [1901] 1 K. B. 583.

(*e*) First Schedule, par. 1 (*b*). *Ante*, 226.

(*f*) *Pattinson v. Stevenson*, 109 *Law Times Newspaper*, 106; *W. C. C.*, 156.

during which he has been in the employment of the same employer. The maximum payment is to be £1 a week.

If the incapacity lasts less than two weeks no compensation is to be payable in respect of the first week. (a)

If the workman is under twenty-one years of age at the date of the injury by which he is totally incapacitated, and his average weekly earnings are less than 20s., he is to be paid the whole of his wages up to a sum of 10s. a week. (b)

We have already considered many of the elements of this compensation, and there is no need for a repetition here. Reference to what has been before said is sufficient. (c)

The maximum of £1 a week is by no means reserved for cases of entire dismemberment, but where there is entire dismemberment no more than £1 can be awarded. (d)

The workman becomes entitled to an annuity to that amount from his employer, subject to a liability, at the instance of the employer to be redeemed by the payment of a lump sum to be settled, in default of agreement, by arbitration. The provision for redemption is subject to the weekly payment having continued for not less than six months.

Where the workman's incapacity is permanent, such an amount must be secured to him as would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity for the workman equal to 75 per cent. of the annual value of the weekly payment. This lump sum may be ordered by the arbitrator to be invested or otherwise applied for the benefit of the person entitled

(a) First Schedule, par. (1) (c) (a).

(b) First Schedule, par. (1) (b) (c).

(c) "Average weekly earnings," *ante*, 322, 324, "employment," *ante*, 369, "in the employment of the same employer," *ante*, 357.

(d) Cf. *Gortchak v. Glend*, 31 W. R. 103. *Ante*, 331.

(e) First Schedule, par. (17). *Ante*, 333.

Chap. IX.

therein. The right to redeem a weekly payment by a lump sum by agreement is not to be affected by this enactment. (c)

The proceeding in which this may be assessed is a new arbitration, and not the original one. (b) The employer is made applicant, the workman respondent.

Discretion of
arbitration
Pattinson v.
Stevenson.

In *Pattinson v. Stevenson*, (c) under the Act of 1897, the County Court judge held that the respondent was entitled to the actuarial value of the weekly payment, viz. £750, less a deduction in respect (1) of any contingency there might be of the condition of the respondent improving; (2) the contingency of his dying at an earlier age than the average of human life. The award of £500 was upheld by the Court of Appeal.

Several material considerations seem, however, to have been overlooked or waived in this arbitration.

Annuity for life,
how estimated

In the first place "an annuity for life" seems to have been accepted as a fixed sum, to be arrived at by an inspection of annuity tables. But it is manifest that the capital value of an annuity differs as the security is good or bad. In the case in question the annuity agreed on was the amount of a perfectly secured annuity, although the workman was entitled only to an annuity secured on a builder's business, for the weekly payment made to him would wholly determine in the event of the employer's bankruptcy, with, say, no assets. It would not be a very valuable security, again, in the event of the builder's death leaving no property. Further, the form of the provision for redemption in the statute, by giving the power to redeem only to the employer, indicates that the benefit of the employer is its object. How, then, would the provision ever be resorted to if the employer, anxious to redeem, were entitled to

(a) First Schedule, par. (17), W. C. R. 1907, r. 59.

(b) W. C. R. 1907, Appendix B. *Post*, 750, Form 5. *Post*, 777.

(c) 109 *Law Times newspaper*, 106, 2 W. C. C. 156.

releem only on substituting the present value of a government or perfect secured annuity for the weekly payment for which his continued solvency was the sole security.² Thus, taking the case of a boy of seventeen in a printer's employment, permanently injured by the loss of a limb, if the value of the weekly payment awarded was £1, on what terms ought the employer to commute?² A government annuity of that amount would be purchasable at about £350, clearly the boy's right to be releemed would be a smaller sum than that. Now the State has stepped in and prescribed on what terms alone the employer shall be permitted to enforce a commutation when incapacity is permanent. In other cases the old law obtains.

In releeming, again, apart from the new enactment, it is not the value of the particular business that has to be taken into account. It is not, a prolonged examination of books would be necessary, and businesses in all respects the most dangerous would be liable to the lowest awards of compensation. It plainly would not be admissible for an employer to seek the benefit of a commutation, and to give evidence that his business was worthless and his solvency doubtful or worse. Neither would it be admissible to show that the employer had a large private estate, and so was better able to pay. The commutation, then, should be on the probabilities of the ordinary trade. What, estimating the average casualties, profits and position of the printing trade—to continue with our illustration—would be the value of an annuity secured on a typical business therein?

An annuity according to the tables is calculated on the *average* duration of human life. Any fact, therefore, that disturbs the average would be admissible either to increase or diminish the commutation. For example, all circumstances of additional danger in the surroundings of the

Chap. IX. injured workman—save those arising from the employment itself—confined locality of living, and all things tending to shorten life or lower vitality, are to be regarded, (a)

In *Pattinson v. Stevenson* (b) the judge made allowance for possible improvement in condition; either from mitigation of the malady, where it admits it, or probably from a greater adaptability to circumstances that increases the wage-earning capacity. Mere inconvenience, loss of beauty, senility, pain or suffering of any kind, are not matter of compensation under the Act. Incapacity for earning the normal rate of wage is the sole circumstance to be considered. If the incapacity is total, the compensation is to last during life; if partial, to stop when the incapacity ceases, or to be measured strictly by the amount of incapacity and without other regards, (c)

On the other hand, it is to be remembered that one of the objects of the Act is to force the employer to insure his risk, and when this mode of meeting the liability becomes general the foregoing remarks must be discounted by the consideration that the workman's security is not the master's solvency, but that of the insurance co., which is quite independent of the master's position.

Par. (17) of the First Schedule has eliminated the principal part of the force of the considerations just noticed in cases of permanent injury, yet though the employer cannot redeem on other terms than those of a government annuity of three-quarters the amount of the weekly payment, the workman can consent to what terms he will, or, perhaps rather, the best he can make with the end of getting a lump sum in view.

Castle v. Manning
Co. v. Atkinson.

An attempt was made under the Act of 1897 in *Castle*

(a) *Howley v. London & N.-W. Ry. Co.*, 14 R. & B. 231 at 232.

(b) 100 *Law Times*, new paper, 106, 2 W. C. C. 156.

(c) First Schedule, (1) (b). *Ante*, 326.

Spinning *On. v. Atkinson* (a) to redeem, so to speak, with limited liability. "The employers ought to redeem" by the payment of a sum not exceeding £180, which sum the applicants are willing to pay the respondent by way of redemption." The County Court judge ordered accordingly. But the award was set aside by the Court of Appeal. "What the Act contemplates is a free and unfettered arbitration as to what sum ought to be paid for the redemption of the liability and not one limited as proposed."

If the employer desires to redeem the liability he must do so by paying such a sum as the arbitrator or County Court judge in his unlimited discretion thinks it right to give. Now in the case of permanent incapacity the only right of redemption (apart from an agreement outside the Act) is on the terms that have been already noted. (b)

The non-exclusive nature of a receipt acquitting the employer of all claim has been already considered, (c) and the conclusions there arrived at hold good in this regard also, with perhaps additional accentuation where "the parties are mutually under the erroneous belief that the injury is trivial and temporary, if it afterwards appears that the injury is permanent" (d).

If a workman receiving a weekly payment ceases to reside in the United Kingdom he becomes disentitled to receive a further payment while away; unless the medical referee certifies that his incapacity is likely to be of a permanent nature. (e) If the referee so certifies the workman is entitled to receive quarterly the amount of the weekly payments during the preceding quarter on proving identity and continuance of the incapacity. (f) Application

(a) [1905] 1 K. B. 336. (b) *Ante*, 553. (c) *Ante*, 116.

(d) See *per* Griffith, C. J., *Great Fincall Consolidated v. Sheehan*, 8 C. L. R. (Ausn.), 176-190, *Dorman v. Alk. & F.* 113.

(e) First Schedule, (1s), *ante*, 334.

(f) W. C. R. 1907, i. 60, *post*, 730, W. C. R. 1908, i. 5. *Post*, 889.

Chap. IX.

has to be made to the registrar on notice in writing and with the report of a medical man selected by the workman who has examined the workman. (a) If the registrar is not satisfied the workman has an appeal to the judge. (b) Either judge or registrar may refer the matter to a medical referee. (c) The employer may then require the workman to submit to an examination by his medical man. (d)

Where the incapacity is certified as likely to be of a permanent nature the registrar is to furnish the workman on application with the documents specified in W. C. R. 1907, r. 60 (8), (c) and shall procure from the workman a statement of his signature, and file the same for reference. At intervals of three months from the date to which the payment was last made the workman shall furnish evidence of the continuance of his incapacity, and a declaration of the identity of the person making the statement, and a request in his own handwriting for the transmission of the sum due, (c) and the registrar, if satisfied, shall obtain the sum due and forward it, deducting expenses. For the detailed procedure the rules, especially those of 1908, are to be consulted.

(13) *Partially Disabled*

Payment during
incapacity

Compensation awarded under this Act for injury or death from compensation awarded at common law, in that event, after the award the payment is contingent on the continuance of the incapacity. By par. (1b) (1) of the First Schedule the employer has a right of investigating the workman.

(a) W. C. R. 1907, r. 60 (2), W. C. R. 1908, r. 5

(b) Form 50A Post, 826

(c) W. C. R. 1908, r. 5 Post, 830 Form 57A Post, 811

(d) W. C. R. 1908, r. 5 (1) 810

(e) Post, 751 Form 50 Post, 821

(f) Post, 752 Also see Forms 58A, post, 817, and 59, 101, and 61 post, 827.

(g) W. C. R. 1907, r. 60 (9) Post, 752 Form 60 Post, 825

(h) 1b (10) Post, 752 Form 61 Post, 828

(i) 1b (11) Post, 752 Form 62 Post, 829

(j) 1b (11) (12) Post, 752 Form 63 Post, 829. (l) Ante, 381.

continued incapacity. If the workman's recovery is more rapid than was anticipated, the weekly payment ceases. The payment, in short, is not in respect of injury, but during incapacity. Under the Act the workman does not recover compensation for pains and suffering, but rather maintenance during the period of disability. Chap. IX.

It thus be so the case may occur where serious injury is received but yet there is no incapacity, and consequently, after convalescence, no compensation under the Act. For instance a sawyer loses two or three fingers; this may be, and as a matter of fact sometimes is, no impediment to his earning full wages as a sawyer, and to this extent is not matter for compensation. He may not be damaged as a wage-earning instrument while he continues a sawyer; but his general adaptability may be greatly impaired, and he may lose opportunities of turning to a more remunerative mode of earning a living. Yet it seems that he is not entitled to compensation (a). The average amount which he is able to earn after the accident as a sawyer is not less than it was before. The possibility of his changing his occupation for a more gainful or honorable one does not enter into the scheme of the Act, for the compensation is to be adjusted with reference to the "period during which he has been in the employment of the same employer."

An injury then that is total which produces a life-long dismemberment and incapacity for other employments is only a subject for weekly payments during the period of illness; it, when the workman has got well, he is able with the consequences of his injury to earn as good wages in the employment in which he was injured as he was previously able to earn before he was injured. Of course there is always open the question of fact whether he really is able to.

(a) Powell Duffryn Steam Coal Co., Ltd. v. Edwards. Times newspaper, 23rd July, 1900.

Chap. IX.

Actual wages at
time of accident
not conclusive

The fact that he is being paid the same wages is not conclusive. It may arise from the compassion or even the artifice of the employers. In Form 1 (a) of the rules is given a form of application for arbitration in the case of injury, and there a particular which is required to be given is the "average weekly amount which the applicant is earning or is able to earn in some suitable employment or business after the accident." From the wording of this it is apparent that the actual wages received at the time of the arbitration is not the test of the injury sustained; indeed it could not be so conclusively, it is merely an element, possibly not even a necessary element in fixing the ability of the workman. For example, were a workman injured in such a way that his power of earning for a short period in favourable circumstances was unimpaired, but so as to be absolutely disabled through enticement to undertake work at a pittance, his case would appear to be a subject for compensation within the Act. (b)

By par (3) of the First Schedule, in fixing the amount of the weekly payment, regard is to be had to the difference of the workman's earnings before the accident and the average amount he is able to earn after the accident. Further, any payment, except wages, which he receives from his employer, while he is incapacitated, is to be taken into account.

If after a weekly payment has been awarded, a change in any of the conditions occurs, either the workman or the employer may require a new arbitration, (d) and the weekly payment may be ended, diminished or increased.

Award dealing
with all issues,
actual and con-
tingent

In one curious case the circumstances admitted of one award finally dealing with the matter (e). A workman

(b) W. C. R. 1907, Appendix. *Post*, 717. (b) *Post*, *ante*.

(c) *Ante*, 323. *See* Webster & Sharp, [1905] A. C. 284.

(d) W. C. R. 1907, rr. 9-11, Appendix, Form 5. *Post*, 777.

(e) *Par.* (16). *Ante*, 333.

alleged that the shock of an accident had produced "glaucoma." On the other hand, it was shown that the accident had not produced, but had accelerated the development of the disease, so that blindness would be produced two years earlier than by the unstimulated disease. An award was accordingly made for the two years' incapacity attributable to the accident (a). This was only under the very exceptional facts of the case, and the judge being of opinion that all the evidence attainable was already before him. Even this finding would not displace the power under the provision just noted if there, in fact, proved to be an alteration in the circumstances.

Bradbury v. Bedworth Coal Co. (b) may be noted in this connexion. A miner was injured and received compensation for a period. Then he returned to work, till the pit was closed and the workmen were discharged. During three months at intervals the workman asked for work of his old employers, fruitlessly. Then a fresh claim to compensation was made on a renewal of the complaint. The County Court judge held that the weekly payment "was received and ended by mutual consent" and the Court of Appeal that there was evidence warranting this. But the mere fact that the workman has returned to work and is in receipt of the same wages as before is not in itself evidence of an agreement to abandon his rights (c).

The test of a workman's right to a weekly payment is loss of wage-earning power—on the assumption that he is actually earning wages at the time of his incapacitation.

(a) Ward v. London & North-Western Ry. Co., 111 Law Times newspaper, 299 J.W.C.C. 192. Lee v. W. Bard & Co., Ltd., 158 L.T.R. 717, is a somewhat similar case.

(b) 2 W.C.C. 138. The Times newspaper, 20th January, 1900, 17th March, 1901.

(c) Williams v. Vauxhall Colliery Co., [1907] 2 K.B. 433.

Bradbury v.
Bedworth Coal
Co.

Test of right
to weekly paym.

Chap IX. In *Horns v. Davis*, (a) a boy of seventeen, who was in receipt of 6*9d.* a week wages, was injured and had to have his thumb amputated. The County Court judge awarded him 2*7s.*, being half of his wages for six weeks (time which he was incapacitated) and, besides, 2*s. 6d.* a week for life. He had, however, been taken back by his employers at the same rate of wages. The Court of Appeal, as to the 2*7s. 6d.* a week, reversed the County Court judge, but there is no difference between his average weekly earnings before the accident and the average amount which he is able to earn afterwards that can possibly be taken into consideration. (b) If in the future that discrepancy arose, the remedy was a resort to the power of review under par. (1) (c) of the First Schedule, (c)

Young workmen. The Act of 1906 has a proviso in favour of young workmen to meet a difficulty that arises when the injury is serious but the wages small. "Where the workman was at the date of the accident under twenty-one years of age and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding fifty per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding one pound." The word "probably" in this paragraph may become the subject of great contention. The apprentice's view of probability and that of the employer may materially vary. Assuming that the method of getting at the compensation laid down by the proviso to par. (2) (a) of the First Schedule is brought to bear, an inquiry into the character, efficiency, and prospects of the injured workman would be relevant, according

(a) [1899] 2 Q. B. 370.

(b) *Id. c.* per Smith, L.J., at 372.

(c) New First Schedule, par. (16). *Ibid.*, 133.

to the principles laid down by *Coxens-Hardy*, M.R., in *Perry v. Wright*, (a) but why should not also the financial position or the practice of the employer? though these would be excluded

Chap. I

In the later case of *Chandler v. Smith*, (b) the same feature as in *Horns v. Davis* recurred. The County Court judge found that the wages for the week of the accident and for the following weeks were paid, not as matters of grace, but in the performance of the contract of service, and that the workman had not been disabled for a period of at least two weeks from earning full wages at the work at which he was employed, and that consequently the Act did not apply. The workman had lost his thumb. His duty was to adjust machinery, and general superintendence. For two weeks after the accident he continued to give supervision, but could not perform his other work by reason of the injury to his thumb, though his wages were paid as usual all the time. The Court of Appeal reversed the County Court judge. The fact that the employer chooses to re-engage the workman at the end of each week at the old wage is some evidence that the employer considers the workman worth that wage, notwithstanding the loss of his thumb. It is plainly not conclusive, but it adhered to will give the workman nothing for what may in the result prove matter for compensation.

"But," continues Williams, L.J., (c) "having regard to the provisions of sec. 1, sub-sec. 1 of the Act, that the employer shall be liable to pay compensation if in any employment personal injury arising out of and in the course of the employment, is caused to a workman, and to the provisions in sec. 1, sub-sec. 3, that the question of liability as

Review of
weekly pay

(a) [1894] 1 K. B. at 452.

(b) [1899] 2 Q. B. 506

(c) *Id.* at 515

Chap IX. well as the question of the amount or duration of compensation is to be settled by arbitration, it seems to me that the County Court judge in this case might and should have made a declaration of liability, and adjourned the question of the amount and duration of compensation. This seems to me to be in accordance with the spirit of the provisions of clause 12 of Schedule 1, which provides that the weekly payment may be reviewed at the request either of the employer or of the workman, and on such review the weekly payment may be ended, diminished or increased. If you may review the award when the facts have been ascertained for certain, it seems only reasonable that you may postpone the fixing of the amount of compensation until the facts are ascertained to which the measure is to be applied, and I prefer this course to that of awarding a weekly payment of a penny, and then applying the provisions of clause 12 of Schedule 1."

If the course adopted in *Heans* is followed, and a penny a week is awarded, adjournment will not be necessary. But if a penny a week be awarded there seems no insuperable objection to proceeding under par. 46 of the First Schedule of the Act of 1906, and asking for redemption. One County Court judge, in an unreported case, has allowed this to be done. Unless the circumstances are exceptional, the objection to this seems to be that the penny has been awarded to keep open contingent liability, while the redemption shuts the parties out. The jurisdiction will probably be only exercised where there is a consent to redeem, or where the contingencies in regard to which the compensation was kept open can be fairly estimated.

Declaration of liability.

The course of making a declaration of liability was followed in *Powell Duffryn Steam Coal Co., Ltd. v. Edwards*. (b)

(a) [1899] 2 Q. B. 330.

(b) *Times* newspaper, 23rd July, 1900.

A collier was obliged to have his leg amputated through an accident within the Workmen Compensation Act. His average earnings had been £1. Compensation at the rate of 10s a week was awarded. The workman then apprenticed himself to a shoemaker. His employers subsequently offered him employment at his old rate of wages in another department of their colliery, which he refused. The employers then applied to the County Court judge to terminate or diminish the weekly payment on the ground that the workman had fully or partially recovered from the effects of his accident since the date of the award within the meaning of para. (2) of the Act of 1897. The County Court judge awarded that the payments should cease. On appeal on behalf of the workman the argument was that "incapacity for work" meant incapacity at the work at which the workman was employed before, and the workman was not capable of working as a collier. The appeal was, however, dismissed on the employers undertaking not to take any objection that the workman was not entitled to apply to the County Court judge in the future to review the award if circumstances should require.

The County Court judge made an order in *Nicholson v. Piper* ^{Nicholson Paper} that the weekly payments should be ended on the ground that the incapacity had ceased. This was affirmed in the Court of Appeal and in the House of Lords. There had been no appeal, and the order was therefore binding. Lord Halsbury said: "A practice has existed now for some years of making a nominal payment in order to keep the question [of compensation] alive. I do not say that there is any legal effect in that practice." "I wish to leave entirely untouched the question whether the practice of making an order for a nominal payment is one which can

Chap. IX. have any legal effect or not." Lord Robertson spoke to the same effect.

The expression of Lord Halsbury is suggestive. The part (16) gives power on review to end, diminish or increase the compensation, and by necessity, if the application is not adequately supported, to leave it as it is. But there is no power where the arbitrator finds that the compensation should be ended because the man is no longer incapacitated to keep it alive lest peradventure he should become so.

Old age or
infirmity.

That the workman has reached an age at which he cannot any longer expect to obtain full wages is not a reason entitling the employers to a reduction in the compensation originally awarded *pro*. When the maximum has been arrived at in the first instance, it is not subject to alteration by anything that takes place subsequently *de*.

On an application to review the County Court judge has to consider whether, and to what extent, having regard to the considerations indicated in the First Schedule *par* 63, it may be proper to reduce the compensation below the maximum by reason of the incapacity for work, which was originally total, having become only partial.

Objection of the
workman to
work offered

In the earlier case of *Ellis v. Knott & Co.* where the employer offered to take back the workman at his old wages, the work offered to the man was such as the County Court judge found the workman could not work at, and "he ought not to compel a man to go back to the employment to which he objected to go." The Court of Appeal affirmed the County Court judge, on the ground that in his mutilated state he was not fit to work at the only work that was offered by his employers. Thus the judge's finding was tantamount to finding that the man's capacity was diminished.

(a) *James v. Life Coal Co.*, 5 F. 958.

(b) *James v. Ocean Coal Co.*, [1904] 2 K. B. 213.

(c) *Times newspaper*, 9th April, 1900.

The contention in *Hingworth v. Walmesley* (a) was that Chap. the County Court judge could only award fifty per cent. of the difference between the amount of the wages before and after the accident, and this was by the combined effect of the First Schedule, par. (b) (b) and par. (2) of the Act of 1897. The Court of Appeal refused to accede to this contention. All that clause (2) means is that the tribunal assessing the compensation is to bear in mind and have regard to the average weekly wages earned before and after the accident respectively. Bearing that in mind, a limit is placed on the amount of compensation that may be awarded, and the only absolute limit is that which is found in clause (1) (a), namely, half the amount of the average weekly wages earned before the accident (a). The rule is the same in Scotland (c). An engine-cleaner claimed compensation for the loss of his right arm. The Company offered to take him back at the same wages as before the accident. He refused, and it was found as a fact that he was no longer able to do the work. The Court of Session held that he was under no obligation to accept the offer.

In *Russell v. Holme* (d) the County Court judge seemed to think it a *proposition de principe* where he points out that "a workman totally incapacitated could only recover one-half his average earnings (not exceeding 20s. per week, whilst a workman partially incapacitated only might recover his full wages;" but the major proposition he assumes is that the compensation bears a necessary proportioned relation to the injury, whereas it is merely the maximum.

However, so far as this goes, *Russell v. Holme* does not

(a) 1900, 2 Q. B. 112.

(b) First Schedule, par. (b) of the W. C. A. 1906.

(c) *L. v. per Bomer, L. J.*, at 111.

(d) *Gr. N. of Scotland Ry. Co. v. Fraser*, 38 Sc. L. R. 603.

(e) 103 Law Times newspaper, 373; 2 W. C. C. 153.

Chap. IX

Pomphrey v.
Southwark Press,
dictum of Collins,
L.J., corrected

correctly state the law. A man who is totally incapacitated can only be compensated to the extent of half his loss. A man who is only partially incapacitated may be awarded the whole difference between his wages before and his wages after the accident, provided that difference does not exceed £1 a week, and may thus be compensated twice as liberally as a man much more severely injured *to*. Pomphrey v. Southwark Press *etc.* has been cited against this view of the law. Collins, L.J. (a) is there reported as saying: "I take it to be clearly settled that the maximum amount which the injured workman can claim is to be measured by the difference between his earnings before the accident and what he can earn after it. The maximum that can be awarded is one-half the difference so ascertained." But in *Wheale v. Rhymney Iron Co. etc.* there is a reporter's note stating that the last sentence of the quotation should be deleted. Instead, therefore, the Law Times Reports gives the words: "The fund out of which that compensation is payable is one-half of the average weekly earnings before the accident."

Injury compensated more liberally than in case of death

The objection moreover applies with greater force between the incapacitating a man and killing him outright. If the man is killed outright the extreme compensation that can be given is £300. Whereas in the case we were lately considering, *Pattinson v. Stevenson, &c.* where a man's

(a) Cp. 1300 (1) Head, 1 W. R. 102.

(b) 13001 J. K. R. 56.

(c) *L. C.* at 91.

(d) 1902 J. K. R. at 61.

[1831, T. 168. In *McGee v. Paterson & Co.* (work on Workmen's Compensation (2nd ed.) at 85, there is a note embodying the statement in the text, and continues: "The matter was considered by the Court of Appeal in a case in which a learned County Court judge had felt bound to follow this very explicit dictum. Collins, M.R., there repudiated the words attributed to him, and the case was sent back to be re-heard", *Jones v. L. & N. W. Ry. Co.*, 1 W. C. C. 110.

(f) 1 W. C. C. 156.

ankle bone was fractured, a redemption payment of £600 was made to him. Chap I

In Scotland the view just advanced was adopted by the Court of Session in *Healy v. Dixon*, (a) The payment of the whole difference is not of right. It is merely one of the elements to be estimated in determining the question of how much is to be given. Nevertheless, the compensation is not limited to the fifty per cent of the difference, and the whole fifty per cent of the workman's average weekly earnings during the previous twelve months, if he has been so long employed may be awarded in the discretion of the arbitrator, but if not then for any less period during which he has been in the employment of the same employer. But in no case is such weekly payment to exceed £1. The same point was before the first division of the Court of Session in *Goultay v. Murray*, (b) where the case was remitted to the sheriff with instructions to put a value on the prospective contributions which the deceased would probably have made if he had lived, keeping in mind that an exact estimate of the deceased's responsibility is seldom possible and is not required by the statute.

Goultay's case was followed in *Parker v. William Dixon, Ltd* (c). The workman's wages in that case were 39s. 6d. a week. From the time of his injury he was employed at light work at wages of £1 a week. He further had 9s. 9d. compensation paid to him during the time he was earning the £1. When this work came to an end his employers offered him other work at a wage of 33s. a week. This he refused, giving as the reason (and this was correct) that his accident had incapacitated him for it. He then sought compensation. The sheriff-substitute, estimating his earning

(a) (1899) 36 Sc. L. R. 640.

(b) 45 Sc. L. R. 577.

(c) 99 Sc. L. R. C33.

Chap. IX. capacity at £1 a week, awarded him 19s. 6d. additional as compensation. The Court on appeal affirmed the sheriff-substitute, the Lord Justice Clerk saying: "Whether the incapacity be total or partial, it is in the discretion of the arbitrator, on a consideration of the whole circumstances, to award half of the former earnings, or any less sum, as long as the sum awarded does not exceed £1. I think the sound principle is expressed in *Heary's case*,* that the compensation is for the difference between his earning capacity at the time of the accident, and his earning capacity after the accident, this latter being, of course, in many cases, a varying quantity from time to time as changes take place in the measure of improvement in recovery."

*Erroneous
principle in
Weber v.
Sharp*

The judge of the Bradford County Court laid down a rule for himself "that the workman is to receive compensation for his loss of wages; whether this is total or partial, but that for the protection of the employer there is the proviso that no more than half his wages is to be paid him. In the case of partial disablement I think the Court should first ascertain what is the loss of wages the person has sustained - in this case 13s. 9d. I think, if this is less than the maximum allowed, namely, half the original wages, the whole of such amount ought to be awarded unless there is some reason to the contrary, but that the Court is not bound to award the whole of that amount, but may award a less amount, say half the difference, if it sees fit." (a) The Court of Appeal held, that to lay this down as a rule of law was wrong. "I think," says Mathew, L.J., (b) "that the meaning of the directions contained in Schedule L., clause 2 of the Act is plain. The County Court judge is thereby directed to consider the relative amounts of the workman's weekly earnings before and after the accident, obviously

(a) *Websker v. Sharp*, [1904] 1 K. B. 218, 219.

(b) *L. c.* 221.

for the purpose of ascertaining whether an amount short of the maximum should be awarded by way of compensation. I agree that the County Court judge is not necessarily bound to fix the amount with reference to the difference between the workman's earnings at the two periods. He may think, for example, that though the workman may at the time be earning a certain amount, after the accident he has received serious injury of a permanent kind and is not likely to continue to earn that average amount. But the comparison of the earnings of the two periods is clearly an element which the judge is bound to consider in relation to the circumstances of the particular case." In the House of Lords *Lord Halsbury* merely said "We think the County Court judge had no right to lay down any such rule as he did lay down: he must decide each case on its merits."

Chap IX

Pomphrey v. Southwark Press (b) has been mentioned on account of the misreported dictum of *Collins, L.J.* It must now be noticed in connection with another point. An apprentice received an injury to his right hand which disabled him from working as a skilled artisan, and his indenture of apprenticeship was cancelled. An award was made based on his wages for the previous year. He returned to the employment as a workman at higher wages than at the time of the accident, but less than those he would have had if the injury had not affected his ability.

Apprentice injured, rule of compensation

The employers applied for a review and termination of the weekly payments, which was refused by the County Court judge, but allowed by the Court of Appeal. "The refusal," says *Smith, M.R.*, *c.* "must have been on one of two grounds. If it was on the ground that had the

(a) [1905] 1 C. 281

(b) [1901] 1 K. B. 86. *Ante*, 568.

(c) *L. c.* at 89

Chap IX. applicant not lost the use of one hand he might now be making more money than the wages he was actually receiving as a labourer, that is a consideration which clearly does not come within the Act. If the refusal was on the ground that the applicant had lost the tuition to which he would have been entitled if the apprenticeship had not been put an end to, that also, in my opinion, was not right. The true reading of the Act is that the average earnings before the accident and after it are to be compared. I am not prepared to say whether the word 'earnings' might not in some cases include more than the cash paid as wages. For instance, I do not say that in the case of a gardener, supposing him to be within the Act, the fact that he was allowed a cottage free, worth say 5s. a week, might not be taken into consideration in arriving at the amount of his weekly earnings." "The sole elements that are to be taken into consideration in arriving at the amount of the weekly payment," says Stirling, L.J., "that should be awarded in such a case as that before us, are the average weekly earnings before the accident, and the average amount which the workman can earn after the accident. The earnings before the accident embrace cash payments, and possibly include other matters, the value of which is capable of being estimated in money, such as clothes, board and lodging; but on this point it is not necessary to express an opinion. As to the value of tuition, which it is suggested should be taken into account, speaking for myself, I should be of the opinion expressed by the two learned judges who decided *Noel v. Rednith Foundry Co.*, (b) that it was not capable of being estimated."

New consideration to be introduced.

To this statement of the law an addendum is to be made by virtue of the proviso to par. (16) of the First

(a) *L. c.* at 92

(b) [1896] 1 Q. B. 453. *Ante*, 239.

Schedule of the Act of 1906. (a) "Where the workman was at the date of the accident under twenty-one years of age and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding fifty per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained unimpaired, but not in any case exceeding one pound." Chap IX.

Freckland v. Metcalane (b) is not in accordance with *Pomphrey's case*. A boy employed in a bakery, and whose duty was chiefly to clean and prepare fruit for baking, sustained injuries necessitating the amputation of portions of his thumb and three fingers. He returned to the service of the same employer after the accident at the same wages. The Court adopted the course laid down in *Chandler v. Smith*, (c) but held in addition that the arbitrator can consider the probabilities that, if the injuries had not been sustained, the workman might be making more money. Scotch Courts do not concur in the English rule.

It is not necessary that the proceedings for review should be by arbitration. The parties themselves may agree, and if they do the agreement is binding. (d) Review not necessarily by arbitration.

To enable a review under par. 16(c) to be made, it is essential that some change in the circumstances can be shown, otherwise under the fiction of a review there could be indefinite rehearings. Thus, in *Crossfield & Sons, Ltd. v. Tamm*, (e) an award had been made by the County Court judge who had before him the statement of the workman that his average wages were £30s. a week before the accident. The employers tendered evidence that they Change in circumstances is for review.

(a) *Idem*, 333 (b) 2 F. 832 (c) [1900] 2 Q. B. 506.

(d) *Bradbury v. Bedfordworth Coal and Iron Co.*, Times new-paper, 17th March, 1900, 3 W. C. C. 138. Cf. *Webster v. L. & N.-W. Ry. Co.*, Law Times new-paper, 20th June, 1901, 3 W. C. C. 52.

(e) *Idem*, 343

(f) [1900] 2 Q. B. 620

Chap. IX. — were no more than 19s. 10½*d.* This was rejected on the ground that no answer within the time limited by the rules had been put in. No appeal was brought. Then, after paying the amount awarded for seven months, the employers made an application for a review of the weekly payment. The circumstances were admitted to be mitigated. The real point was to upset the award on the 30s. and to have one substituted on the basis of 19s. 10½*d.* a week. The Court of Appeal held such an attempt inadmissible. "Clause 12 (c) means that in cases where a weekly payment has been ordered, and the injured workman gets better in health and earns better wages, the employer may apply for a review; on the other hand, the man might get worse and might be able to earn less wages, and he might in such a case take proceedings for a review. It is any weekly payment 'not any award' which may be ended, diminished or increased, upon such an application by either employer or workman, subject, as the clause itself says, to the maximum before provided in the schedule;" *b*

Graig Brick Co
v. Williams

Messrs. Parsons & Bertram, in their work on the Workmen's Compensation Act, note an unreported case of Graig Brick Company v. Williams in the Court of Appeal, holding that a definite offer of work made by the employer was such a "change of circumstances" as to entitle him to apply for a review of a weekly payment, although there had been no change in the workmen's condition since the award. But the offer will be subject to the consideration we have already noticed when considering *Ellis v. Knott* and that group of cases. (*d*)

An application may be made by the workman for a

(a) Now par. (16) of the First Schedule.

(b) 1900 2 Q. B. per Smith, L.J., at 631.

(c) (3rd ed.) 124.

(d) *Ant.*, 566.

reconsideration of the sum payable to him, even after the Court has decided that the workman's total incapacity has ceased, that is, where the question has been kept alive; (a) for this decision is not *res judicata* which may not be avoided by a change in the circumstances (b). *Crossfield & Sons v. Raman* was urged as an authority to the contrary, but Collins, M.R., pointed out that in *Crossfield's* case there was no appeal against the award, but subsequently the employers applied for a review of the weekly payment on the ground, really, that they had not been able to set up the true facts at the hearing. In the case now being reviewed, "the application appears to be on the ground that evidence is now forthcoming to prove that, by subsequent experiment, the decision based on the speculative opinion of medical experts has been shown to be erroneous." "I think that there is a change of circumstances where subsequent experience has shown that the previous opinion based on expert evidence was wrong."

The fact that since the accident the workman has set up a business of his own, and is earning profits, should be considered in determining whether the weekly payment should or should not be ended or diminished (c). The problem for the arbitrator is to see how far the money-earning capacity of the workman has been altered, and if it was as good as it was before the accident that is a fact not to be ignored, though the source of income were not wages earned from an employer. The County Court judge is entitled to find that the workman's opportunity of finding employment has been narrowed in consequence of the accident, when it is shown that he had made *bona fide* efforts to get such work as he was capable of doing before the accident, and this though it

Workman sets up business

Clark v. Gas Light & Coke Co.

(a) *Prompney v. Southwick Press*, [1901] 1 K. B. 86.

(b) *Sharman v. Hollday & Greenwood, Ltd.*, [1901] 1 K. B. 235.

(c) *Norman & Burt v. Walder*, [1904] 2 K. B. 27, 20 T. L. R. 427.

Chap IX. is proved that his physical condition is such as to allow of his earning the same wages; (ii) for there is much disinclination to employ an injured man. The standard of compensation is the difference between the wages he was able to earn before the accident and the wages he is able to earn after the accident.

Arbitrator may
inquire into
circumstances of
cessation of
incapacity

The arbitrator has power, on an application to review a weekly payment on the ground that the workman's incapacity has ceased, to inquire whether the incapacity had ceased when the application to review was made, or at any and what subsequent time before the hearing.

Morton & Co. v
Woodward

In *Morton & Co., Ltd. v. Woodward*, (b) a riveter engaged in boiler-making lost the sight of one eye. Compensation was paid weekly, till ultimately the employers asked for a review under the First Schedule, par (12), in November. The hearing took place in December, when it appeared that the workman had submitted to an examination in the previous September at the instance of his employers. The report of a medical referee was then ordered, who did not report till January in the following year. The case was not again heard till April, when the judge ordered that the weekly payment "be diminished to the weekly sum of one penny, as and from the 16th day of April instant, but this award is made without prejudice to the rights and remedies of the respondent under the said agreement for the arrears of the weekly payments up to the 16th day of April instant inclusive." The judge found that the workman had been able to earn the same amount of wages since 2nd September

(a) *Clark v. Gas Light and Coke Co.*, 21 T. L. R. 151.

(b) [1902] 3 K. B. 276. The Scotch judges are not in accord with this. *Steel v. Oakbank Oil Co.*, 5 F. 244, the Lord Justice Clerk Macdonald dissenting; *Penaptherston Oil Co., Ltd. v. Cavaney*, 5 F. 963, Lord McLaren dissenting; *In Southbrook Fire Clay Co., Ltd. v. Langhland*, 15 Sc. L. R. 664, the two above-mentioned cases were distinguished on the ground that in the present case there was no recorded memorandum—only *de facto* payments, not a judgment. See *Fife Coal Co., Ltd. v. Davidson*, [1907] S. C. 90.

that he had earned previously to the application for arbitration. The employers appealed on the ground that they should not be held liable to pay since that date, otherwise they would have to pay merely in consequence of delay in hearing the case. The Court of Appeal sustained this contention. One particular piece of evidence, the referee's report, was conclusive, but only conclusive as to the condition of the workman on the 2nd January. "That may throw, and must throw, some light on his condition at the earlier date; but as I (a) read the Act, there is nothing whatever to make that certificate the sole admissible evidence as to the condition of the man at an antecedent date, or even at the subsequent date when the matter comes on for decision."

Chap. IX.

It has been before noticed (b) that the acceptance of compensation blots out the claim for wages. The claims are inconsistent. If the workman is entitled to his full wages, he is not entitled to any sum under the Workmen's Compensation Acts; if he is entitled to payments under these, he is taken to forego his right to wages. (c)

Compensation is inconsistent with continued claim for wages.

Rathwell v. Davies (d) decided that there is nothing in the Act which imposes an obligation on a workman to submit to a surgical operation in order to render himself fit. In this particular case there was some risk involved, but this fact may be eliminated as irrelevant to the decision, which went on the principle. In Scotland the Courts seem disposed in some cases to take upon themselves to decide whether or not an operation should be submitted to. Thus

Rathwell v. Davies

(a) Cozens-Hardy, L. J., *loc. cit.* at 232.

(b) *Ante*, 531.

(c) *Ellthott v. Luggers* (1902) 2 K. B. 84. The power to require a workman to submit himself for examination by a duly qualified medical practitioner under the First Schedule, par. (1), is considered, *post*, 1675.

(d) 19 T. L. R. 423.

- Chap. IX. in *Anderson v. Baird* (a) a workman had submitted to two operations on his thumb, but declined to submit to a third, which was said to be "a simple one not attended with serious risk or pain, and such as a reasonable man not claiming compensation would for his own advantage and comfort elect to undergo." This was held to disentitle him to compensation. Lord Young dissented. In *Sweeney v. Pumphreys & Co.* (b) the suggested operation was the removal of a piece of the workman's elbow bone, from which the man's doctor dissuaded him. The Court refused to subject the man to any penalty for declining to submit to it. In *Donnelly v. William Baird & Co., Ltd.* (c) the operation was "unattended with danger to life or health or with serious suffering"; it was the amputation of a finger. The Court, on the workman's refusal to undergo it, held him "precluded from further insisting on his claim for weekly payments." Lords Stothman-Darling and Pearson dissented on the ground that a workman's refusal to undergo a surgical operation even of a minor kind cannot be visited with a practical denial of his right to further compensation.

Allowance from
benefit society

Neither can the employer reduce the compensation by showing that the workman is getting a weekly allowance from his benefit society. Where it is shown that "incapacity for work results from the injury" the condition of the Act is complied with. The payment is to be made "during the incapacity."

In case of death the payment of compensation is to be paid into the County Court unless otherwise ordered (d).

(a) 5 T. 373. *Dowds v. Bennie*, 5 T. 268. The employer was held justified in discontinuing weekly payment, where the workman's incapacity is caused by neglect to exercise an injured limb to prevent its getting stiff.

(b) 5 F. 972.

(c) 45 K. L. R. 391, followed by the C. of A. in *Warricken v. R. Moreland & Son (Ltd.)*, *Times* newspaper, Dec. 1st, 1908.

(d) 1st Schedule, par. (5). *Ante*, 329, W. G. R. 1908, i. 4. *Post*, 837, Form 53A. *Post*, 811.

Any sum paid into Court shall be invested, applied or otherwise dealt with in such manner as the Court thinks fit for the benefit of the persons entitled. The receipt of the registrar shall be a sufficient discharge in respect of the amount paid in.

If the sum allotted to any person is ordered to be paid out or applied by periodical payments, such payments may be made to the person entitled to receive the same either at the office of the registrar or on the written request of such person by crossed cheque or post-office order addressed to such person and forwarded by registered post letter. Payment, by post is to be in all cases at the cost and risk of the person requesting the same. (a) Where the workman leaves no dependants, if so agreed, the payment shall be made to his legal personal representative; or if there is no such representative, to the person to whom the expenses of medical attendance and burial are due. This refers to the provision of the First Schedule, par. 1 (a) (iii).

The legal personal representative of the deceased workman may make the application under the Act. (a) Under the old rule it was necessary he should make it; now it is optional, the dependants themselves may make it, though there is a legal representative. But in either case the particulars filed must state on behalf of what dependants the application is made. (c) In the case of a conflict amongst them, those not authorizing the application must be named as respondents. (d)

The money paid to the legal personal representative is not to be distributed as the workman's personal estate. (b)

(a) W. C. R. 1907, r. 56 (10) Post, 719

(b) W. C. R. 1907, r. 4 (1) Post, 716

(c) Ib.

(d) W. C. R. 1907, r. 4 (2)

Chap IX. The legal personal representative is merely the conduit to convey it to the dependants, unaffected by all charges whatsoever attaching to the rest of the deceased's estate (*a*). It is held for distribution amongst the dependants. The County Court judge may order its investment (*b*). In the case of the existence of dependants' medical and burial expenses which are then not recoverable under par. (1)(a) (iii) are covered by par. (5) under the words "be invested, applied, or otherwise dealt with by the Court in such manner as the Court in its discretion thinks fit for the benefit of the persons entitled thereto under this Act."

Right to
compensation
survives

The right to compensation survives and passes to the personal representative of the deceased dependant (*c*).

No selection
amongst
dependants

There is no power to direct payment so as to exclude some of the dependants or to alter from time to time the distribution made in the first instance unless the dependants are *sui juris*, and are thus in a position to renounce their rights (*d*).

Daniel v. Ocean
Coal Co.

In *Daniel v. Ocean Coal Co.* (*e*) the Court of Appeal ordered that £116 7s. of an award of £246 7s. should be paid to the widow for her own use, and the residue of £100 apportioned to, or for the benefit of, the sons notwithstanding the opposition of the widow should be paid to the registrar of the Court to be invested by him in his name in the Post Office Savings Bank for the benefit of the sons; the interest arising from such investment to be from time to time until further order paid to the appellant [the widow], to be by her applied for the maintenance, education, or benefit of her sons.

(a) Except as provided for by the Second Schedule (14) *Ante*, 340

(b) First Schedule (5) *Ante*, 320

(c) *Darlington v. Rose & Sons* (1907), 1 K. B. 219 *Ante*, 175

(d) *Manchester and Carlton Iron Co., Ltd.*, 30 T. L. R. 155

(e) [1900] 2 Q. B. 250.

The appeal was by the widow against so much of the decision of the County Court judge as directed the investment of her children's share of the award. The employers appeared on the appeal, but they were not allowed their costs, as they "had no interest in the matter and need not have appeared in response to the notice served on them." It would be unsafe from this decision to draw an universal rule that an employer who makes "application for the settlement of any matter by arbitration" under W. C. R. 1900, 10a (1), (2) with a view to see that the interests of the children of a deceased workman in his employment are properly secured would not get his costs. Probably he would not, and probably he would not wish to get them at the expense of the dependants he was philanthropically anxious to assist. Nevertheless there might arise cases where the employer's intervention would entitle him to the costs, and where, if he claimed them, they would be allowed. Such a case, however, would be most exceptional.

Chap IX.

Investment of children's share of an award as against deceased's widow

Any sum directed to be invested may be invested in the purchase of an annuity through the Post Office Savings Bank, or placed there at deposit in the name of the registrant, without affecting any rights of the beneficiary (and obviously not of the registrar) with respect to any other post-office account he may have. (b)

Annuity

Money invested under the Act is not to be paid out except upon authority addressed to the Postmaster-General by the Treasury or by the judge of the County Court. (c)

Money invested, how paid.

Any beneficiary may open any other account in a Post Office Savings Bank without incurring any penalty. (d)

Post Office account.

(a) Corresponding to W. C. R. 1907, c. 10. *Post*, 717s.

(b) *Post* Schedule, par. (11). *Ante*, 330.

(c) *Post* Schedule, (12). *Ante*, 331.

(d) *Post* Schedule, (13). *Ante*, 331.

Chap IX Arbitrator has power to limit statutory rights Weekly payment not assignable	<p>The arbitrator has no power to impose limitations on the Statutory rights conferred by the schedule. (<i>a</i>)</p> <p>A weekly payment, or the sum payable for the redemption of it, may not be "assigned, charged or attached," and shall not pass to any other person by operation of law, nor shall any claim be set off against the same. (<i>b</i>)</p>
Exemptions of scheme	<p>Par. (21) provides for exempting a scheme under the Workmen's Compensation Act, sec. 3, from certain provisions of the Friendly Society's Act, 1896 (<i>c</i>). This we considered when we were dealing with the right conferred by the Act (<i>d</i>).</p>
Synonyms.	<p>Where reference is made to the "County Court," "Judge of the County Court," "Registrar of the County Court," "plaintiff" and "rules of Court," in the application of the Act to Scotland these terms are to mean respectively sheriff court, sheriff, sheriff clerk, pursuer, and act of sederunt. (<i>e</i>)</p>
Money on deposit	<p>Where money is deposited under the Workmen's Compensation Act in the Post Office Savings Bank in Ireland, the provisions of the County Officers and Courts (Ireland) Act, 1877, with respect to money deposited in the Post Office Savings Bank is to apply. (<i>f</i>)</p>
Insurance and insolvency of employer	<p>Exceptional provisions for recovering the compensation awarded are made for the benefit of the workman where the employer is insured and becomes bankrupt. (<i>g</i>) or</p>

(a) Osburn, Vicker, Son & Maxam, (1900) 2 Q. B. 91. *Post*, 622.

(b) First Schedule, (19). *Ante*, 331.

(c) *Ante*, 331.

(d) *Ante*, 427.

(e) W. C. Act, 1906, s. (13).

(f) First Schedule, (22) *Ante*, 335.

(g) S. 5 (1). *Ante*, 306.

compounds or makes an arrangement with his creditors, Chap IX, or is a company in liquidation.

The workman is to have transferred to and vest in him ^{workman to have employer's rights vested.} the right of the employers as respects the liability of insurers to pay compensation money. The County Court judge may order the amount due to be paid into the Post Office Savings Bank in the name of the Registrar, and may order the same to be invested or applied in accordance with the First Schedule, pars. 110-113 (c.)

The case contemplated by the section was likely to ^{Some of the section} occur in a shape to cause hardship to the workman very rarely if at all. In most policies of insurance there is a provision that notice of the claim arising from the accident must be given within a certain defined number of days. If this is not done the insurance company is released. If it is done, the insurance company deals with the claim apart from the employer, but with all the employer's rights and adopting all his liabilities.

The case, however, might occur apart from the Act, where workmen having recovered judgment against an insured employer, before the judgment is realized, the employer becomes bankrupt. The workmen would then, in the absence of any step by the insurance company, have to prove against the estate. The insurance company would be liable to indemnity; and the workmen might be left to prove on their judgments *pari passu* with other creditors. Thus if the estate realized £5 in the £2, the workmen would only get so much, and this would be all the insurance company could be called on to pay. The trustee, if he chose, might pay the whole sum due, and would then be entitled to recover against the insurance company. But supposing him not willing to assist the workmen, and the insurance

Chap IX. company not willing to pay—two, in practice, most improbable suppositions—there would at least be some expense and trouble to compel him as an officer of the Court “to do the fullest equity.” (a)

Accident
occurring after
receiving order

If an accident happens after the making of a receiving order, and while the employer's business is being carried on for the creditors by the official receiver or the trustee, he is liable as employer. (b)

New remedy

The section gives the workmen under the W. C. Act, 1906, a speedy and direct remedy against the insurance money by making their claim a first charge upon it. The charge makes the workmen secured creditors, and the procedure gives them a summary way of enforcing their charge.

Where the liability of the insurers to the workman is less than the liability of the employer to the workman, the workman may prove for the balance in the bankruptcy or liquidation (c)

The amount of compensation payable under the W. C. Act, 1906, to the extent of £100 shall be a preferential debt under the Preferential Payments in Bankruptcy Act, 1888, (d) where the liability to pay accrued before the date of the receiving order in the case of a bankrupt employer, or the date of the commencement of the winding up, where the employer is a company in liquidation, but not where it is wound up voluntarily for the purposes of reconstruction

(a) Cf. *Ex parte James, In re Comdon*, 11 R. 9 Ch. 609, *Ex parte Simmonds, In re Carnac*, 18 Q. B. D. 308, *In re Tyler, Ex parte the Official Receiver*, [1907] 1 K. B. 865, *In re Hall, Ex parte the Official Receiver*, [1907] 1 K. B. 875.

(b) *Burt, Boulton & Hayward v. Bull*, [1893] 1 Q. B. 276.

(c) S. 5 (2). *Ante*, 306.

(d) 51 & 52 Vict. c. 62, for Ireland 52 & 53 Vict. c. 60, s. 1, Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19).

or of amalgamation with another company (a); and where the compensation is a weekly payment the amount due in respect thereof shall be taken to be the amount of the lump sum for which the weekly payment could be redeemed if the employer made application for that purpose. (b)

In the case of the winding up of a company within the Statutory Act, 1887, the priority is that conferred on wages of a miner by sec 9 of that Act (c). Where the bankrupt or the company being wound up has entered into a contract with insurers the priorities created by the section shall not apply. (d) This appears to be irrespective of whether the bankrupt is fully insured or not. In the latter event consequently the workman has no priorities.

By sec 5 the rights of the employer are transferred to and vest in the workman. There is a statutory subrogation of the workman to the employer's rights (f). No larger right is given against the insurance company than the employer has. Thus, in the circumstances, eliminating the bankruptcy, the employers have no claim against the insurers, the workman has none. Again, where the policy provides for the payments continuing only so long as the premium continues to be paid, if the employer discontinues the payment the liability of the insurance company ceases on the instant. So, too, the bankruptcy of the employer in such a case determines the liability of the insurance company to make further payments (g).

Proceedings under this section are not a part of an

(a) S. 5 (6)

(b) S. 5 (3) *Infra*, 307

(d) S. 5 (1)

(c) 50 & 51 Vict. c. 43

(f) S. 5 (5)

(g) *Knyveton v. Northern Employers' Mutual Indemnity Co., Ltd.*, [1902] 1 K. B. 880

(g) *Morris v. Northern Employers' Mutual Indemnity Co., Ltd.*, [1902] 2 K. B. 165.

Chap. IX.

Not an
arbitration under
the Act

arbitration under the Act. They are a matter altogether subsequent to the arbitration and award. Consequently an appeal lies, not to the Court of Appeal under the Second Schedule, par. (1), but to a Divisional Court (a) under the County Courts Act, 1888, sec. 120, (b) which confers a right of appeal in the case of "any action or matter" as there limited. *Prima facie*, then, a Divisional Court would seem to have jurisdiction to entertain an appeal with regard to "any matter" with which a County Court judge has dealt in the exercise of his jurisdiction, and there is nothing in the Workmen's Compensation Act, 1906, which takes away a right of appeal.

It may also here be mentioned that it has been decided that there is an appeal to a Divisional Court, from the refusal of a County Court judge to direct a review of taxation of the costs of an application to review a weekly payment under the First Schedule, par. (12), of the W. C. Act, 1897 (c).

Procedure as to
liens under
sec. 5

The procedure is regulated by r. 35 of the Workmen's Compensation Rules, 1907 (d). It is to be noted that power under the section is only given in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or a company commenced to be wound up.

Workman's
application

A workman who claiming compensation under sec. 5 is unable to ascertain whether the employer is insured may apply to the County Court; the application may be supported by affidavit for an order for the examination of the employer; and if the Court sees fit to make an order, the provisions of

(a) *Lorch v Life & Health Assurance Association* (1901) 1 K. B. 507; *Morris v Northern Employers Mutual Indemnity Co., Ltd.* (1902) 2 K. B. 166.

(b) 51 & 52 Vict. c. 43.

(c) *Rugby & Co v Cox*, [1904] 1 K. B. 358; 2 K. B. 208. The corresponding par. 14 (12) of the First Schedule of the Act, 1906.

(d) *Post*, 738.

Order xiv, rr. 71, 72 of the County Court Rules, 1903, shall apply, as if the employer were a debtor liable under a judgment or order. (a)

The provisions of the Act as to arbitration are to apply to any question as to the liability of the insurers or the amount of their liability. (b)

Two cases unreported came before the Court of Appeal in the spring of 1902, where a County Court judge had conceived the notion that an insurance company, to whom the rights and liabilities of the employer had been assigned, was not entitled to be heard on the arbitration. Accordingly, on it appearing on the correspondence that the case was defended by the insurance company, he refused to allow counsel to address him. So soon as the case was quoted the Master of the Rolls, addressing the King's Counsel who appeared for the respondent, asked him how he proposed to maintain the award, as it was clear that the judge had gone wrong. The counsel said he felt he could not urge anything effective in support of the ruling, upon which judgment was given for the appellants. On this, the second case, *Nelson v. Mansley, Son & Field*, was allowed to follow the fate of its predecessor. (c)

A policy of insurance covering the liability of an employer to compensate his workmen for injuries by accident in the course of their employment was negotiated, and the representative of a firm of insurance brokers procured the signature of the employer to a proposal for the same, which was to the agent of the Life and Health Assurance Association, who signed a form of receipt or covering note, which stated, "cover to hold good from this date." The covering note contained no conditions. While

(a) W. C. R. 1907, r. 85 (2).

(b) W. C. R., 1907, r. 85 (3).

(c) *Ex relatione*.

Chap. IX. the covering note held good and no policy was signed a workman of the employer was injured; from the effects he subsequently died. The day after the injury the policy was signed. It contained a condition that the employer should give immediate notice of any accident causing injury to a workman. There was a further condition that the observance and performance by the employer of the times and terms set out in the policy so far as they contained anything to be done by the employer were the essence of the contract. The Court of Appeal held (Fletcher Moulton, L.J., dissenting) that in the absence of evidence that the employer either knew of, or had the opportunity of knowing of the existence of the condition at the date of the accident, the condition was one with which it was impossible to comply, and the true inference was that the insurer never imposed the condition on the employer at the time of the accident. (a)

The judge is to be the judge either of the district in which all the parties concerned reside, or if they reside in different districts the district in which the accident occurred, or of some other to which the matter has been transferred. (b)

Power, how exercised.

The County Court judge is compelled to exercise this power in a proper case, though he may find the facts necessary to be proved as the foundation for the exercise of his power not proved or disproved.

The legal proposition relevant is thus stated—

Lord Cairns's proposition.

“Where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon

(a) *In re* an arbitration between Coleman's Depositaries and the Life and Health Assurance Association, [1907] 2 K. B. 793.

(b) Second Schedule, (11) *Ante*, 899.

which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised," (a) or as it was otherwise expressed—"Embling words are construed as compulsory whenever the object of the power is to effectuate a legal right" (b)

Chap. IX.
—
Lord Blackburn
proposition

In Alderman Backwell's case (c) "the Lord Keeper declared, though the words in the Act of Parliament were that the Chancellor *may* grant a commission of bankrupt, yet that *may* was in effect *must*, and it had been so resolved by all the judges, and the granting of a commission was not a matter discretionary in him, but that he was bound to do it (d)

Backwell's case

The workman's right is dependent on two conditions: — Conditions of workman's right arising.

- (1) The employer must be entitled to a sum from insurers.
- (2) The employer must be—
 - (a) Bankrupt; or
 - (b) Making a composition, or arrangement with his creditors, or
 - (c) If a company, winding up

The fulfilling of these conditions transfers or vests the rights of the employers against the insurers in the workman.

A policy insuring the employer against his liability to his workmen, is not a "policy of insurance against accident" within the definition of sec. 98 (1) of the Stamp Act, 1891 (e)

Employer's policy not against "accident" within 54 & 55 Vict. c. 39

(a) Pro Lail Gane, L.C., *Jubus v. Bishop of Oxford*, 5 App. Cas. 214 at 225

(b) Per Lord Blackburn, *l.c.* at 241

(c) 1 Vern. 153.

(d) The word in the particular Statute was not "may," though equivalent to it. See per Lord Blackburn, 5 App. Cas. at 242.

(e) 54 & 55 Vict. c. 39.

Chap. IX. -- in which case it would only require a penny stamp—but is a contract of indemnity, and so a deed requiring a 10s stamp. (a)

It not under seal it is an agreement, and is liable to a duty of 6*d.*

Bankruptcy
where no
insurance.

The case of bankruptcy of the employer where there is no insurance may be noted.

Three forms of this may occur

- (1) Where there is a claim by dependants for a lump sum;
- (2) Where there is a claim by the injured man for future instalments of an award of weekly payments.
- (3) Where there is a claim by the injured man for a redemption payment.

(1) This may be either a sum ascertained before the bankruptcy, or to be ascertained at the moment of bankruptcy.

In the former case there is the right to preference up to £100 given by sec. 5 (3), for the definition of workman covers "dependants or other person to whom or for whose benefit compensation is payable," (b) there is, further, the ordinary right of proof against the bankrupt's estate.

In the latter the question arises whether the claim for compensation is a "demand in the nature of unliquidated damages" (c) or not. The payment seems rather to be a statutory liability to pay an ascertainable amount arising on a contingency, which contingency has happened. The sum

(a) *Lancashire Insurance Co v Commissioners of Inland Revenue*, [1895] 1 Q. B. 353

(b) S. 18

(c) *Leech v. Life and Health Association*, [1901] 1 K. B. 707

payable can be exactly ascertained by purely arithmetical processes—except in the case of partial dependants. Even there the maximum liability is fixed. The liability has nothing in it of the nature of damages, for it is based on no tortious act, and is an incident engrafted on the contract of employment and becoming operative without any fault of either employer or workmen.

(2) The liability to pay weekly payments is a future debt, subject to a contingency. The value is accordingly to be determined by the Court (a).

(3) The claim in respect of a redemption payment seems to differ nothing from that of lump sum. It is an ordinary debt, with no special procedure for enforcement, and dealt with under sec. 5 (3) and under the ordinary Bankruptcy law.

In the case of the employer being a company in liquidation, the winding-up procedure has to be taken into account instead of the Bankruptcy law.

Any sum awarded as compensation must be paid on the receipt of the person to whom it is payable under any agreement or award. (b)

Persons entitled to receive compensation.

This person may be either—

- (1) The workman himself, in the case of weekly payments, (c)
- (2) The registrar of the County Court, (d)
- (3) The legal personal representative, (e)

(a) 16 & 17 Vict. c. 52, sec. 37 (1)

(b) Second Schedule, par. (14), *ante*, 340

(c) First Schedule, par. (1) (b), *ante*, 326

(d) First Schedule, par. (9), *ante*, 329, and s. 13, "Workman," *ante*, 320

(e) First Schedule, par. (1) (a) (i), *ante*, 325, and s. 13, "Workman," *ante*, 320.

Chap. IX.

- (1) The dependants, (*a*)
- (5) The dependants in part dependent, (*b*)
- (6) The medical attendant and the undertaker, (*c*) or the persons who have, in the case of the death of the workman, made themselves responsible for these expenses, (*d*)
- (7) Any person authorized under the award, (*e*)

Infant's receipt

The words of the section are general enough to cover the payment on the receipt of an infant, if a sum has been awarded as compensation to him. In the case of an infant dependant the powers of the First Schedule, par. (7), would most likely be invoked. On application by the person liable to make a weekly payment, or by or on behalf of the person entitled to such payment, that such payment be paid during the disability into Court, the County Court judge may make an order to that end, (*f*). There is no intention indicated in the Act to validate the receipt of a minor, possibly a child. The minor by law is not *sui juris*, the Act does not make him so, and the system of the common law, where not interfered with, has to be read with the Act.

Where a weekly payment is payable under the Act to a person under legal disability a County Court may order that the weekly payment be paid during disability into Court. (*g*)

(*a*) First Schedule, par. (1) (a) (i) *Ante*, 325

(*b*) First Schedule, par. (1) (a) (ii)

(*c*) First Schedule, par. (5)

(*d*) First Schedule, par. (5), *ante*, 323

(*e*) Second Schedule, par. (9), *ante*, 337, *Daniel v. Ocean Coal Co.*, [1900] 2 Q. B. 250.

(*f*) W. O. R., 1907, r. 57. *Post*, 719. Form 51. *Post*, 824. See *Ledward and Hassells*, 2 K. & J. 370, *Ex parte Brocklebank*, *In re Brocklebank*, 6 Ch. D. 358. *Potion of infant*, *Stephens v. Dombudgo Ironworks Co., Ltd.*, [1904] 2 K. B. 225, *Robertson v. Henderson*, 6 F. 770.

(*g*) First Schedule, par. (7), and W. O. R. 1907, r. 57.

In the case of neglect of children on the part of a widow, or of change of circumstances, or "for any other sufficient cause," an order as to the apportionment amongst the dependants of any sum sued as compensation or as to the investment of any such sum may be varied, and the Court may make such varied order as the Court may think just. (a)

In any case coming under the provisions of the Act, (a) applicable to seamen, (b) the weekly payment shall not be payable in respect of the period during which the owner of the ship is liable to defray the expenses of the maintenance of the injured man.

The law on this point is now contained in sec. 34 of the Merchant Shipping Act, 1906, (c) whereby the shipowner is at the expense of maintenance and medical attendance and the necessaries for a sick sailor (whose illness is not caused by his misbehaviour), till he is cured or dies, (d) or is returned to a proper return port, as well as for his conveyance thither, and thus without any deduction on that account from his wages.

If the injured person is removed from the ship for the purpose of preventing infection, or otherwise for the convenience of the ship, and subsequently returns, all the intervening expenses fall on the owner of the ship. Notwithstanding the provisions about limitation of liability in the Merchant Shipping Act, 1891, (e) any sum payable by way of compensation under the Workmen's Compensation Act, 1906, is to be paid in full, unless it is a sum recoverable by way of indemnity under sec. 6 (2) (f).

(a) First Schedule, para. (1)

(b) S. 7 (c). *Id.*, 308

(c) 1 Edw. VII. c. 48

(d) 57 & 58 Vict. c. 60, s. 503.

(e) S. 7 (1) f

CHAPTER X

PROCEDURE

WHERE any question arises in any proceedings under the *Workman's Compensation Acts* as to

- (1) Liability to pay compensation, or whether the person injured is a workman to whom the Act applies;
- (2) The amount of compensation;
- (3) The duration of compensation payments. If the difference is not settled by agreement it is to be settled by arbitration as provided for by the Act *(a)*

To bring the procedure of the Act into operation, it is imperative that there must be some definite question <sup>Must be a
de bonis question
in dispute.</sup> in dispute.

"It is thus," says Collins, M.R., in *Field v. Longden & Sons*,^(b) "by the terms of the sub-se. made a condition precedent to the right to proceed to arbitration, and to the arbitrator's jurisdiction, that a question should have arisen. . . and, again, assuming that such a question has arisen, there is another condition by which the jurisdiction may or may not be ousted, namely, that the question has not been settled by agreement. . . I think that, upon the admitted facts of this case, no question ever did arise; because, on the workman sustaining the injury, the employers commenced and continued to pay to him weekly

(a) S. 1, sub-s. (3), *ante*, 300.
1*

(b) [1902] 1 K. B. 47 at 52

- Chap X. all that he could possibly be entitled to by way of compensation under the Act. They never disputed his right to such compensation, and he, of course, received it without objection." The learned M.R. subsequently shows (a) how the employers made "an express offer of everything that the workman could possibly get by arbitration," and stated that "they are quite prepared to have a memorandum filed, but call attention to the fact that an effective agreement to pay compensation according to the Act is in force." He thus concludes—(b) "I think that the respondent had no right to go to arbitration, because no question existed between the parties when the request for arbitration was filed. I cannot agree with the contention that the request for arbitration in itself creates a question, because the section in terms provides that a question must have arisen as to the liability to pay compensation, or as to the amount or duration thereof, before the provisions as to arbitration come into play."
- * Proceedings.
- Memorandum ordered to be recorded. Jones v. Great Central Ry. Co (c) is a simultaneous decision to the same effect. In this case, however, the employers presented a memorandum of agreement under the Second Schedule, par. (8), to the appellant, who refused to sign it. They then sent it to the registrar, who refused to record it. The Court of Appeal ordered the registrar to record it.
- What is a proceeding. There has been acute difference of opinion as to what is a proceeding (d) under the Act.
- The considerations bearing on the determination of this in the abstract may be illustrated by *Ex parte* Johnson,

(a) L. c. at 53.

(b) L. c. at 54.

(c) 16 T. L. R. 66, 4 W. C. C. 23.

(d) Cp. "Stroud Judicial Dictionary," *sub voce*.

In re Johnson, (a) where Cotton, L.J., says "The question we have to consider is whether a debtor's summons is a 'proceeding in bankruptcy.' I think a debtor's summons, *being issued for the purpose of founding upon it an adjudication of bankruptcy*, is certainly a 'proceeding in bankruptcy.'"

Chap. X

Proceedings,
Proceeding in
bankruptcy.

Again, in *Spencer v. Watts*, (b) the question was whether taking out money paid into Court and paying in on a counterclaim was "any other proceeding in the action." Lindley, L.J., says "The expression has light thrown on it by the context, and 'any other proceeding in the action' means *any proceeding with a view to continuing the action*."

Thus it would seem by analogy that a "proceeding under this Act" indicates any step taken for the purpose of rendering effectual the remedies provided by the Act. The normal foundation of proceedings under the Act is the giving notice under sec. 2 (1), (c) and the first proceeding is the filing with the registrar a request for arbitration. (d) The applicant's request for arbitration "shall be deemed to be a summons with particulars annexed." (e)

Notice is not itself a proceeding, nor is a claim; (f) they are cautionary precedent to proceedings. ^{Not this, not a proceeding.}

In the House of Lords in *Powell v. Mann Cellulose Co.*, (g) the ordinary meaning of the term "proceedings," as it is understood to mean some form of known legal procedure,

Proceeding
do fixed.

(a) 51 L. J. Ch. 300, also reported 22 Ch. D. 112 at 115 in slightly differing words.

(b) 54 L. J. Q. B. 353. Cp. *Nixon v. Tyson*, [1901] 2 K. B. 487, as to a "proceeding instituted" within the meaning of s. 2 of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 61).

(c) *Ante*, 301.

(d) W. C. R. 1907, r. 8. *Post*, 718.

(e) W. C. R. 1907, r. 27 (1). *Post*, 729.

(f) S. 2 (1). *Ante*, 301.

(g) [1900] A. C. 366.

Chap X**Proceedings**

was distinguished from its use in the Workman's Compensation Act. "The word proceedings," says the Lord Chancellor, (a) "is used in a sense different from that which would describe legal procedure ordinarily."

Lord Brampton's view

Lord Brampton interprets sec 2 (1) and its dependent clauses in popular language thus (b) "If you desire compensation, give notice of your injury as speedily as you can, and send in your claim within six months, try to agree with your employer, but if you fail to do so you may then enforce your right to compensation by arbitration, but you will not be entitled to an arbitration or to insist upon compensation unless you have given your notice and claim as the Statute directs you to do."

Lord Halsbury's

Lord Halsbury explains the intent of the Act and its interpretation thus "It appears to me that the statute deliberately and designedly avoided anything like technology. I should judge from the language and the mode in which the statute has been enacted that it contemplated what would be a horror to the mind of a lawyer, namely, that there should not be any lawyers employed at all, and that the man who was injured should be able to go himself and say, 'I claim so much,' and that then he should go to the County Court judge and say, 'Now please to hear this case because my employer will not give me what I have claimed.' It appears to me that that is the meaning and construction of the whole statute, and that is what the Legislature intended, and that is the reason why it avoided any technical phrases. It strikes one at once that, if anything which to a lawyer's mind would be in the nature of a technical application or a technical commencement of the litigation was intended, the Legislature was competent and had sufficient knowledge to say what it meant."

(a) *L. c.* at 370.(b) *L. c.* at 381.

The latitude allowed is well illustrated by *Lowe v. Myers & Sons*, (a) By their answer to an application for compensation the respondents said they had paid to the applicant a sum which he had accepted in satisfaction of all claims. They also said that no claim for compensation had been made within six weeks of the accident. The County Court judge dismissed the claim on this ground, but his decision was reversed by the Court of Appeal on the ground that the statement in the answer as to payment of compensation afforded some evidence of a claim having been made which the County Court judge ought to entertain.

Chap. X.

Proceedings

Proceedings are not normally maintainable unless—

exceptions
precedent to
maintaining
proceedings

(1) Notice of the accident has been given

(a) As soon as practicable after the happening of the accident;

(b) Before the workman has left the employment in which he was injured; and

(2) A claim for compensation has been made

(a) Within six months of injury; or

(b) In case of death, within six months thereof.

The want of notice, or any defect or inadequacy therein, is not to be a bar to the maintenance of the proceedings—

(1) If the employer is not prejudiced by the want, defect or inadequacy, or would not be if a notice or an amended notice were then given and the hearing postponed.

(2) The want, defect or inadequacy was occasioned by mistake or absence from the United Kingdom or other reasonable cause.

Notice of action is clearly one requisite. The claim for compensation is another. It was agitated whether claim for

(a) [1906] 2 K. B. 265.

Chap X. compensation was identical with the "request for arbitration"
 the commencement of proceedings in the tribunal which is
 to decide the case.

Proceedings
 Claim for compensation
 necessary.

In sec. 1 (3) the word "proceedings" means claim for compensation and refusal (a) This claim for compensation and refusal are a necessary preliminary to the commencement of proceedings before an arbitrator. "It is to be borne in mind," says *Romer, L.J.*, (b) "that before arbitration can be resorted to at all, either before the special committee, or before any other arbitrator, or before the County Court judge as an arbitrator, there must be a question arising between the parties--there must be a difference. How can there be a difference which will entitle either party to go to the committee or to the arbitrator unless a claim has been made which is challenged, which is denied, and which is refused? Then and only then does a question arise."

We may then conclude that the preliminaries to arbitration are --

- (1) Notice of accident;
- (2) Claim for compensation;
- (3) Request for arbitration

(1) NOTICE OF ACCIDENT

The notice of accident must give

- (1) the name and address of the injured person;
- (2) the cause of the injury, stated in ordinary language;
- (3) the date of the injury

It must be served on the employer, either by delivering the same to him or at his residence or place of business; if

(a) Per *Romer, L. J.*, *Powell v. Manx Colliery Co.*, (1900) 2 Q. B. at 161. *Lord Davey*—[1900] A. C. at 378—adopts *Romer, L. J.*'s reasons. Page 1, *Burtwell*, [1909] 2 K. B. 759.

(b) *L. c.* at 158.

may also be served by post at the employer's last known place of residence or place of business, if the employer is a body of persons then at any of their offices. (a)

Chap. X.

Notice of accident

Sec. 2 of the Workmen's Compensation Act, 1897, differs from the corresponding sections in the Employers Liability Act, 1880, as follows --

(compared with the corresponding sections of the Employers Liability Act, 1880)

- (1) Notice under this section must be given "as soon as practicable after the happening of the accident and before the workman has voluntarily left the employment in which he was injured"

By sec. 1 of the Employers Liability Act, 1880, notice must be given within six weeks from the occurrence of the accident

- (2) Under this section a claim for compensation in case of death must be sent in within six months from the time of death.

By sec. 1 of the Employers Liability Act, 1880, twelve months are allowed to the bringing of an action.

- (3) Under this section want of notice or any defect or inaccuracy in such notice is not to be a bar to the maintenance of "proceedings" if in any case it is found in the proceedings that the employer is not or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced, or if the want, defect, or inaccuracy of notice was occasioned by mistake, absence from the United Kingdom, or other reasonable cause

By sec. 1 of the Employers Liability Act, 1880, in case of death only, want of notice is not to be a bar if the judge is of opinion there was reasonable

(a) S. 2 (2), (3), (4), (5). *Ante*, 302. Cp. The Interpretation Act, 1889 (52 & 53 Vict. c. 68), s. 26.

Chap. X.

Notice of
accident

excuse for such want of notice; in all other cases want of notice is a bar to the action.

- (4) Under this section defect or inaccuracy of notice is condoned in the same circumstances and to the same extent as want of notice.

By sec. 7 of the Employers Liability Act, 1880, defect or inaccuracy is excused unless the judge shall be of opinion that the defendant is prejudiced thereby, *and* that the defect or inaccuracy was for the purpose of misleading.

- (5) This section comprehends both notice of the accident and claim for compensation, two things that may be distinct. Under the Employers Liability Act, 1880 there is but one notice and the *action* has to be commenced within six months, or in case of death within twelve months. Request for arbitration in this Act stands in the place of the "action" under the Employers Liability Act, 1880.

Save in the particulars indicated, sec. 2 of the Workmen's Compensation Act, 1906, is identical with secs. 1 and 2 of the Employers Liability Act, 1880, under which the same matters are treated. (a)

It may be noted that when the requirements of sec. 2 are complied with "proceedings" are maintainable. In the case of the Employers Liability Act an action may be brought.

Notice of
Accidents Acts,
1894 and 1906.

The Notice of Accidents Acts, 1894 (b) and 1906 will probably have a considerable bearing on the working of the provisions of the notice clauses of the Workmen's Compensation Act, 1906.

Effect of.

By these Acts the *employer* is bound as soon as possible,

(a) *Ante*, 259.

(b) 57 & 58 Vict. c. 23. The Factory and Workshop Act, 1901 (Edw. VII c. 22), Part I (in) Accidents, is repealed by the Sched. 6 Edw. VII. c. 53, but s. 4 of that Act is substituted.

and in case of an accident not resulting in death not later than six days after the occurrence of the accident, to send to the Board of Trade notice of any accident occurring in any of the scheduled employments which causes to any person employed therein either loss of life or such bodily injury as to prevent him on any of the three working days next after the occurrence of the accident from being employed for five hours at his ordinary work.

Chap X.
Notice of
accident

The employments specified in the Schedule are —

- (1) The construction, use, working or repair of any railway, tram-road, tramway, gaswork, canal, bridge, tunnel, harbour, port, pier, quay, or other work authorized by any local or personal Act of Parliament
- (2) Construction or repair by means of a scaffolding of any building which exceeds thirty feet in height, or use or working of any such building in which more than twenty persons, not being domestic servants, are employed for wages.
- (3) Use or working of any traction engine, or other engine or machine worked by steam, in the open air.
- (4) These may be extended by order of the Secretary of State "in every case of any special class of explosion, fire, collapse of buildings, accidents to machinery or plant, or other occurrences in a mine or quarry, or in a factory or workshop, including any place which for the purpose of the provisions of the Factory and Workshop Act, 1901, with respect to accidents is a factory or a workshop. (a)

Where the employer is bound himself to give notice of

(a) 6 Edw. VII. c. 53, s. 5 (1).

Chap. X. accident within six days, and is penally liable if he neglects
Notice of to do so, it will very rarely happen that he will be able to
accident show that he is "prejudiced" in not receiving notice within
 six months.

Why notice A notice should be given in case of injury within six
should be given. weeks of the time of accident in order to save the workman's
 right of claiming under the Employers Liability Act, 1880,
 if he should be so disposed, instead of under the Workmen's
 Compensation Act, 1906.

Service by post. Ser. 26 of the Interpretation Act, 1889, *as* applies to
 service by post under the Workmen's Compensation Act,
 1906, by which service shall be deemed to be effected by
 properly addressing, prepaying and posting a letter con-
 taining the document, and, unless the contrary is proved, to
 have been effected at the time at which the letter would be
 delivered in the ordinary course of post.

Notice of The method of giving notice of the time and place of an
arbitration. arbitration under the Act is prescribed by rule 11; the
 service is regulated by rule 15. (*b*)

Where no special provision is made by the Workmen's
 Compensation Rules for the service of any document or
 notice, then service is to be made in the manner provided
 by sub-secs. 3 and 4 of ser. 2 of the Act with reference to
 service of notice in respect of an injury, and the provisions
 of County Court R., 1903, Order LV. r. 2, shall apply to the
 service of any such proceeding, document or notice. (*c*)

"With all Nicholls v. Hall (*d*) turned on the construction of a
practicable provision that notice should be given "with all practicable
speed." speed"; and it was held that knowledge of the facts was an
 essential ingredient in the case.

(a) 52 & 53 Vict. c. 63.

(b) W. C. R. 1907. *Post*, 720.

(c) W. C. R. 1907, r. 77 (4). *Post*, 702.

(d) L. R. 8 C. P. 322.

In *Cooper v. Woolley* (a) the obligation was "to consume as far as possible the smoke," &c.; and it was held that the words meant "as far as possible consistent with carrying on the trade in an ordinary manner and with a careful use and management of a properly constructed furnace."

Chap. X.

Notice of
accident
"as far as
possible."

The question of the *onus* of proving that the respondents were not prejudiced in their defence was dealt with in the Scotch case of *Shearer v. Miller & Sons* (b). It was argued that being a matter primarily within the knowledge of the respondent he should in the first instance give some evidence that he was injured beyond the mere fact of the non-receipt of notice; but the *onus* was held to be on the applicant, though it is not necessary for the discharge of this that separate evidence should be given—the proof may be as a consequence from other facts. For example, where a large number of persons have admittedly been injured, but claims have only been sent in by some, the mere statement would probably displace the *onus*, and the employer would have to satisfy the arbitrator that he had been prejudiced. "In order to get out of the vice of want of notice of accident the workman is by sec. 2, sub-sec. 1 of the Act bound to show that the employer is not thereby prejudiced." (c) On the other hand, delay does not necessarily prejudice within the section, and an arbitrator is not justified on proof of delay only in refusing to hear the case. Opportunity must be given to prove that the delay was not in fact prejudicial. (d)

onus of proving
that respondents
are not
prejudiced
Shearer v.
Miller & Sons.

Two Scotch cases have been decided on this point. In *Rankine v. Allon Coal Co.* (e) the applicant did not give

In Rankine v.
Allon Coal Co.

(a) L. R. 2 F. 84.

(b) 2 F. 114.

(c) Per Collins, J. J. *Goshorn v. Vickers, Son & Maxam*, 69 L. J. Q. B. at 607. This passage is not to be found in the Law Reports' report.

(d) *McLean v. Carso & Holmes*, 1 F. 878.

(e) 6 F. 875.

Chap. X.

Notice of
accident.Brown v.
Lochgelly Iron
Co

notice because he underrated the injury he had
and his doctor did not explain so fully as was necessary,
make him appreciate his injuries for fear of giving a
shock. The Court held that even though the age of the
were prejudiced by the delay yet it was an occasional
mistake for which there was a reasonable excuse. In the
of *Brown v. Lochgelly Iron Co.* (a) was similar. The case
continued to work for eleven weeks after he was injured.
Then he stopped work, and a week after this gave notice
of the accident. The Court ordered him to give notice
the section in the Act of 1906 is much extended from that
of the previous Act. There the question was *beyond*
statibus was the employer prejudiced in his defence by
want, defect, or inaccuracy. Now the additional question
has to be answered—would he be if a notice of accident or
notice were given at the time when objection is entered
the hearing postponed? (b) To take the point taken in
of accident or of death, disablement, or suspension of
notice given, the respondent must file his answer with the
ten clear days before the day fixed for proceeding to
arbitration, stating his ground of objection (c) along with the

In the event of non-compliance with the
applicant not permitting a waiver, the judge's rule, and the
terms as he shall think fit, either proceed or may on such
tion and allow the respondent to avail himself of the arbitra-
matter, or adjourn the arbitration to enable himself or such
to file such answer. (d)

The judge has a discretion about this, (e) and
standing the opinion of Williams, L.J., it is a
practice to grant terms where the workman's claim
be extinguished by unended proceedings. (f) In would

(a) [1907] S. C. 198.

(c) W. C. R. 1907, r. 17 (1).

(e) *Silvester v. Cude*, 15 T. L. R. 431.

(b) S. 2 (1) (a).

(d) *Ib.* (4).

A notice of injury not followed by a claim for compensation is not a "proceeding" under the Act. Though they ^{Notice of accident} are two separate steps there is nothing to prevent both being comprised in one document. (c)

Chap. X.

In the case of an injury in the sea service but not on a ship, notice of accident may be served on the master if he is not the person injured. But where the accident happened and the incapacity commenced on board the ship, it is not necessary to give any notice of the accident. (c)

(2) CLAIM FOR COMPENSATION

The claim which may be embodied in the notice of injury but which is yet an independent requirement of the statute may be entirely free from technicality. In *Powell v. Main Colliery Company* (c) the claim was in these words: "I claim the sum of 15s. per week from the 1th day of January, 1899, until such date as I shall be able to resume work, as compensation for injury received by me, on the 21st day of December, 1898, at your colliery at Bryn-erch, -William Powell." This was given within six months of the injury. "No one could reasonably doubt, unless he is forced by some circumstances extrinsic to the actual words under construction, that this was a 'claim for compensation.'" "It was also made by the person who was alleged to have suffered, and it was served upon the person who was alleged to be liable, and the 'claim' so stated and described in the written paper was made for a definite amount in respect of an accident described by its date;" and "no person, unless forced to give an artificial meaning to the words of the section, could doubt that it was a 'claim for compensation'." It purports on the face of it to be a

No technicality needed.

Powell v. Main Colliery Co.

(c) *Perry v. Clements*, 17 T. L. R. 525

(b) S. 7 (1) (a). *Ante*, 309.

(c) [1900] A. C. 366 at 369.

Chap. X. claim for compensation' under the Act." (a) This is sufficient, and it is not necessary that it should be made in the ordinary course of legal proceedings. "As soon as the claim is sent to the employer he can, if he disputes it, himself take the difference to arbitration and have it settled." (b)

Claim for compensation.
No limitation of time for request for arbitration.

The claim for compensation and its denial are, save as hereafter (c) noticed, necessary preliminaries to the request for arbitration. It follows, then, that to this last there is no limitation of time. If the unequivocal claim for compensation is made within the six months the request for arbitration may be indefinitely deferred. This formed the basis of an objection to regarding the request as different from the claim. It was urged that, a claim having been made by the workman, the whole matter might then be hung up in defiance of the employer. (d) *Romer, L.J.*, replies to this: "Would it not be an extraordinary case to suppose that when a workman had made a claim for compensation, and the master refused to agree to it, the workman should stand by for six years and not proceed? It would, I think, be a most extraordinary case. Is it to be wondered at that no form can be found specially dealing with such a case? The objection that the master cannot compel the workman to go on in such a case is theoretical; but, assuming the theory, it can be met by a theory—and that a good theory, too—that the master can force the workman on in such an extraordinary case." The Lord Chancellor also points out (e) that as against an employer anxious to proceed it would be an impossible one. "If it is meant that there is no mode actually pointed out by the Statute, I agree; but

(a) Per the Lord Chancellor, *l. c.* at 370.

(b) Per Lord Robertson, *l. c.* at 382.

(c) *Post*, 612.

(e) [1900] A. C. at 372.

(d) [1900] 2 Q. B. at 162.

it is left to the ordinary law in that respect, and I have **Chap. X.**
never heard yet that a defendant cannot apply to an arbitrator for an appointment to have settled a question ^{claim for compensation}
which has arisen between himself and his co-litigant. It
has happened to me before now, and I dare say to all of
your Lordships who have sat as arbitrators, that if a plaintiff
has been found shilly-shallying and declining to go on, an
appointment has been applied for, and I dare say it has
happened to most of your Lordships in that event to give a
peremptory appointment for such and such a day, and to
say that you would go on in the absence of the plaintiff
unless he appears. Why is not that procedure applicable
to this matter?" Romer, L.J., answering the objection
that there was no form provided, says (a) "If there had ^{Absence of form immaterial}
been no such rule as rule 67, (7) I should still have said
that the forms were machinery, and that the absence of a
special form was no answer to the right of a master to
demand arbitration, when, as I have pointed out, the Act of
Parliament has clearly given him the right to demand
it . . . The master has only to take a form and adapt it to
his special case, and, in my opinion, he is entitled to
demand arbitration under such circumstances as I have
indicated, and to compel the County Court judge, if there
is no special committee to arbitrate upon the question."

The result of this decision was the issue of supplementary rules formally to meet the case of the employer desiring to set the arbitration procedure in motion.(c) These merely adapt the procedure at the instance of the workman to the procedure where the employer moves in the matter.

(a) (1900) 2 Q. B. at 162.

(b) See now W. C. R., 1907, r. 84.

(c) W. C. R. 1900, rr. 10a*, 11*, 14* (2), 17* (5), 18* (7), 22* (a), 24* (d).
See now W. C. R. 1907, rr. 10, 14 (2), 17 (5), 18 (5), 25.

Chap. X.

Claim for
compensation
Claim not
necessarily a
written one

The claim need not be in writing, though, obviously, it had better be. In *Lowe v. Myers & Sons*, (a) *Romer, L.J.*, says: "Of course if it was necessary that the claim should have been made in writing different considerations might arise. But the Act does not say that, nor that any particular formalities should be adopted, and in my opinion it is not necessary that the claim should be in writing, or attended by any formalities, provided it is a claim made under the Act."

Claim must be
within the six
months
Failure to make
a claim.

But the claim (b) for compensation should be made within the six months. Yet the failure to make a claim within six months from the occurrence of the accident causing the injury, or in case of death, within six months from the time of death, is not a bar to the maintenance of proceedings if it be found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause, (c)

There is some incongruity at first sight between this provision which guards against a "failure to make a claim," and the preceding provision, (d) which is to apply where there is "want of or any defect or inadequacy in the notice of accident." But *omne majus in se continet minus*, and "failure to make a claim" will doubtless when necessary be construed to be failure to make a *valid* claim, i.e., specifying the names of workmen and employer, the amount of compensation demanded, and the date of the accident, (e) and its healing operation will be applied to any defect or inadequacy that would go to mar a claim as well as to a total failure.

(a) [1906] 2 K. B. 265, 273

(b) S. 2 (1). *Ante*, 101.

(c) S. 2 (1) (b).

(d) S. 2 (1) (a).

(e) *Powell v. Main Colliery Co., Ltd.*, [1900] A. C. 366. (p. *Bennett v. Wordie*, 1 F. 250, *Kilpatrick v. Wemyss Coal Co., Ltd.*, [1907] S. C. 320.

Absence from the United Kingdom, a trip to the Channel Islands, for example, is a very clumsy excuse for admitting a stale claim, but as it is linked with "other reasonable cause" the judge would probably consider himself bound to consider the *bona fides* of the excuse given, though perhaps he would prefer to base his action on more general grounds. (a)

Chap. X.

Claim for compensation

Ridley, J., held in *Perry v. Clements* (b) that a mere notice of injury was not sufficient without a claim for compensation; in the absence of which latter there was no proceeding under the Act. Judge Stender held in *Trenear v. Wells & Co.* (c) that a letter containing notice of injury, with the addition of the words: "I shall be extremely obliged if you will let me know what compensation you will allow me. An immediate reply will oblige" is a claim for compensation. In *Perry v. Clements* it seems to have been admitted that there was nothing in addition to the mere notice of injury, so that there is no conflict between this case and *Trenear v. Wells*. There can be no doubt that a claim for compensation may be contained in the same document as the notice of injury; or, indeed, in no document at all, but may be orally communicated. Form of claim.

Notice of injury
is not
sufficient.

Form of claim.

Though there are elaborate provisions with regard to the service of the notice of injury, which must be in writing, there are none with regard to the making of the claim of compensation. We have seen that this may be oral. (d)

(a) *Rogers v. Halley*, 22 L. J. Ex. 211, per Pollock, C.B., 218.

(b) 17 T. L. R. 525. Notice of injury, payment of compensation and request for arbitration were held not to amount to a claim in *Lee v. Gortonwood Collieries Co.*, 1 W. L. R. C. 32.

(c) *Law Times* newspaper, 28th July, 1900. 1 W. L. R. C. 58.

(d) *Ante*, 610.

Chap. X. Whether a claim has been made or not will be a question of fact for the arbitrator

Claim for compensation

In *Bennett v. Worhe* (a) the document relied on as a claim for compensation was worded thus: "Messrs. Worhe & Co. Thomas Bennett, stableman, 86, Albert Street, Dundee, has consulted me in reference to the death of his son, Thomas Bennett, who was killed while in your employment in the pite warehouse in Mid-Wind, Dundee, in August last. As the accident arose in the course of deceased's employment, and as insufficient precautions were taken for his safety, I am instructed by his father to intimate that he holds you liable for compensation and *solatium*. This notice is given in the terms of the Statutes." The Court held that here there was no "claim for compensation," with which decision the Lord Chancellor did "entirely agree," (b) as he did also in the Irish case of *Murno v. Workman*, (c) and on the ground that there was "absolutely no claim."

Claim for no specific amount.

In another Scotch decision, *Pieser v. Great North of Scotland Ry. Co.*, (d) the point was discussed whether the absence of a claim for a specific amount invalidated the claim. This was left undecided, though on principle there seems no doubt that it does not. All that is required is definitely to propose compensation; the amount is immaterial. That has to be settled in default of other means in the arbitration; and the employer has, in the majority of cases at least, as much material for judging what the amount should be as the workman. What the Court did decide was that a request for arbitration is a sufficient claim. This would seem to concede the principle of the other point.

(a) 1 F. 855.

(b) 1900 A. C. at 373.

(c) 31 Ir. L. T. R. 14.

(d) 3 F. 908.

. That a request for arbitration is a sufficient claim was conceded in *Wright v. Bagnall & Sons, Ltd.* (a) On the same point in *Fraser v. Great North of Scotland Ry. Co.* (b) Lord McLaren says: "I cannot find that any member of the Court of Appeal, or any of the judges who took part in the decision of the House of Lords, ever doubted that a request for arbitration filed in a County Court would have been a good claim if made within the statutory period of six months."

Chap. X
claim for
compensation
Request for
arbitration
sufficient claim.

The deputy County Court judge in *Wright v. Bagnall & Sons, Ltd.*, further held as matter of law that the six months' limit was absolute, and that it was not open to the workman to show that the employers have defrauded themselves from taking the objection. That is, of course, in the absence of fraud. In this the Court of Appeal reversed him holding that on the facts there was evidence of an agreement that compensation was to be paid, the only question left open being the amount. Where there is a statutory liability on the employer to pay compensation and the amount is left open for future settlement, there is evidence thus constituted from which the judge may find that the employer is estopped from setting up that the claim for compensation had not been made within six months.

Employers may
waive objection
by conduct

This reasoning appears to be in accordance with the holding of the Court of Appeal in *Lanklater v. Webster*, (c) and it certainly accords with *Powell v. Main Colliery Co.*, (d) which strongly negatives anything like "technology." "It certainly is a very familiar rule of construction that you have no right to add words to a statute unless the exigency of the rest of the statute which you are construing

Lanklater v.
Webster.
Powell v. Main
Colliery Co.

(a) [1900] 2 Q. B. 240.
(c) 6 W. O. C. 50.

(b) 8 F. 908.
(d) [1900] A. C. 366, 371.

Chap. X.
Claim for
compensation

tenders it necessary for you to do so." But in *Kilpatrick v. Wemyss Coal Co.*, (a) and in *Mayer v. Park*, (b) the Scotch Courts held that a claim means a demand for a definite and specific sum. They also adopted a severely literal construction in *O'Neill v. Motherwell*, (c). There a woman who had been totally incapacitated through an injury received in the course of her employment received from her employer for a period of six months thereafter the sum of 10s. a week, which was 9d. a week in excess of the maximum under the Act. After the period of six months the employers proposed to pay no more than 5s. per week. The woman then presented a request for arbitration. The Court held that there was nothing in the circumstances that availed the strict rule of the Act of 1897. But now as the failure to make a claim at all is no bar to proceedings it is not to be antiquated, as has just been pointed out, that the failure to insert figures (which are substantially supplied by the First Schedule) occasioned by mistake or other reasonable cause would work any irreparable evil.

Beath v. Keay
& Ness

The limit of a claim for compensation one would have thought was reached in *Beath v. Keay & Ness*, (d) where a workman having obtained a decree for 17s. a week "until further orders of Court," subsequently accepted employment with the same employers at 31s. a week, which were the same wages as before the accident. He continued in the employment for some time, and no steps were taken by the employers "to have the decree for weekly payments renewed or terminated." Having left the employment the workman claimed against the employers for the weekly payments from the date of the decree. The employers

(a) [1907] S. C. 230.

(b) 8 F. 250.

(c) [1907] S. C. 1076. 2 (1) (b).

(d) 6 F. 168.

offered payment of the 17s during the time the workman was not working. Lord Pearson ordered them to pay the sum claimed, but was reversed by the Court, who held that the workman was not entitled to payment under the licence for the time he was earning full wages. The attempt to obtain a profit payment in the manner above indicated was repeated in *Nimmo & Co v. Fisher*, (a) but *Beath v. Keay & Ness* was followed.

In *Wm. Baird & Co v. McWhinnie*, (b) a similar provision was advanced, the effect of which would have been to secure the workman a sum largely in excess of his full average wages paid to the accident. Here also he was unsuccessful.

Wright v. Bagnall (c) was distinguished in *Rendall v. Hill's Dry Docks and Engineering Co* (d). A workman having been injured received through an insurance company half the amount of his wages, giving a receipt that the money "was received on account of compensation which may be or become due to me under the Workmen's Compensation Act, 1897." They paid for ten months, when they ceased. Thereupon the workman filed a request for arbitration. The County Court judge held that the receipts were "either claims for compensation or evidence that a claim had been made." He was reversed by the Court of Appeal. In *Wright v. Bagnall* it was said that "the claim for compensation had not been made within six months of the accident," and the County Court judge held "that the parties had agreed that there was a statutory liability on the respondents to pay compensation, and that each of them had reserved the right to go to the Court to have the amount determined." "Where," said Smith, L.J., (e)

(a) [1907] S. C. 890.

(b) 45 S. L. R. 338.

(c) [1900] 2 Q. B. 240.

(d) [1900] 2 Q. B. 245.

(e) *L. c.* at 249.

Chap. X.

claim for compensation

Wm. Baird & Co.
McWhinnie.

Rendall v. Hill's
Dry Docks and
Engineering Co.

Chap. X.

Claim for
compensation

"is there any evidence in the present case that the parties agreed that there was a liability on the part of the employers to pay compensation? I can see no evidence of any such agreement."

Oliver v.
Nautilus Steam
Shipping Co.

Stirling, L.J., thus explains *Rendall v. Hill's Dry Docks & Engineering Co.* in *Oliver v. Nautilus Steam Shipping Co.* (a) "There what took place was that apparently no notice of the injury was sent under the Act, nor was any formal claim put forward, but payments were made by an insurance company on behalf of the master, and receipts were taken precisely in the same form as are found to have been taken in the present case. In that state of things the County Court judge before whom the case came held that a claim for compensation under the Act did not mean only an application for arbitration, he further held that if, having regard to the defence of the appellants, it was open to them to object that the weekly receipts signed by the respondent were not claims for compensation, such receipts were either claims for compensation or were evidence that a claim had been made, and that the appellants, by taking such receipts and paying the weekly sums therein mentioned, either waived a claim for compensation or were estopped from taking their objection. He held, therefore, that the employers were not entitled to set up the objection that no claim had been made within the six months." At that time the decision in *Powell v. Mann Colliery Co., Ltd.*, (b) in the Court of Appeal was standing, and the case was decided with reference to that decision. But it does not seem to me that that exhausts the case, because A. L. Smith, L.J., who delivered the judgment of the Court,

(a) [1908] 2 K. B. at 655; 19 T. L. R. 607.

(b) [1900] A. C. 366.

after referring to the receipt, says, (a) Do these circumstances show a waiver of the six months' limitation, or amount to an estoppel against setting up that defence? Clearly they do not. The case on *Wright v. Bagdall* has been referred to. What was the *ratio decidendi* in that case? There the claim for compensation had not been made within six months of the accident, and the County Court judge held, as my brother Collins says, that the parties had agreed that there was a statutory liability on the respondents to pay compensation, and that each of them had reserved the right to go to the Court to have the amount determined. My brother Vaughan Williams seems also during the argument to have said what was exactly to the same effect. Where is there any evidence in the present case that the parties agreed that there was a liability on the part of the employers to pay compensation? I see no evidence of any such agreement."

Chap X

Claim for compensation

Wright v. Bagdall cannot, therefore, be taken to lay down any rule apart from its very special facts—certainly not the rule that the workman does not lose his right to recover if the employer, by temporizing, spins out negotiations beyond the time of limitation. (b)

The objection that there is no claim for compensation, or that the claim is out of time, must be taken in the answer to the particulars annexed to the request for arbitration under rule 17 (1). (c) In *Hingworth v. Walmsley* (d) the County Court judge refused leave to amend so that the appellant might allege no claim for compensation within the six months. As the allowance of the amendment would necessarily be fatal to the application,

Objection that there is no claim to be taken in answer

Leave to amend refused.

(a) [1900] 2 Q. B. at 249

(b) *Reeves v. Hoarne*, 1 M. & W. 323.

(c) W. C. R., 1907, *Post*, 721.

(d) [1900] 2 Q. B. 142, 16 T. L. R. 281.

Chap. X.
 ———
 Claim for
 compensation
 Death in the
 sea service

it would probably not be admitted in any case unless very good cause were shown. (*a*)

In the case of the death of a muster, seaman or apprentice in the sea service, or an apprentice in the sea fishing service or a pilot, (*b*) where the Act applies, (*c*) the claim for compensation shall be made within six months after news of the death has been received by the claimant, (*d*) and shall state the date at which news of the death was received by the claimant, (*e*) and (where the claim arises out of the loss of the ship) the date at which the ship was lost. (*f*)

It will be sufficient in the proceedings to describe the owners of the ship as "the owners of the ship ——" Service of document or proceedings will be sufficient if made on the managing owner or manager for the time being, or (except where the master is claiming compensation) on the master of the ship; and sec. 696 of the Merchant Shipping Act, 1894, (*g*) sub-sec. (1), the section as to service of notice, shall apply to service on the master of the ship, and where the master is claiming compensation, and there is no managing owner of the ship, service may be effected in accordance with par. (c) of the said sub-section, (*h*) by affixing a copy to the mast of the ship.

The presumption as to a lost ship is declared by sec. 174 (2) of the Merchant Shipping Act, 1894. Where a ship has twelve months or upwards before the institution of any proceedings left a port of departure and has not been since heard of for twelve months, she is to be deemed to have been lost with all hands on board, either immediately

(a) *Cp. Silvester v. Cude*, 15 T. L. R. 434.

(b) S. 7 (3).

(c) S. 7 (1).

(d) *Ib.* (b).

(e) W. O. R. 1907, r. 36 (2).

(f) *Ib.* (3).

(g) 57 & 58 Vict. c. 60.

(h) W. O. R. 1907. *Ib.* (6).

after the time she was last heard of or at such later time as the Court hearing the case may direct. **Chap. X.**

Claim for compensation.

Sub-sec (3) of the same section specifies certain documents which if produced out of the custody of the registrar-general of shipping and seamen, or of the board of trade, shall be, in the absence of proof to the contrary, sufficient proof that the seamen and apprentices therein named as belonging to the ship were on board at the time of the loss.

These sections are made applicable to the cases of seamen under the W. C. Act, 1906. Proceedings for the recovery of compensation in such cases are to be maintainable if the claim is made within eighteen months of the date at which the ship is deemed to have been lost with all hands (c)

(3) REQUEST FOR ARBITRATION.

The request for arbitration must be made either--

- (a) By the injured man.
- (b) By his legal personal representative.
- (c) By the dependants, or any of them (b)
- (d) By any one entitled to the reasonable expenses of his medical attendance and burial (c)
- (e) By any one claiming to be a dependant (d)
- (f) By the employer (c)

The person making the request is the applicant. All other persons brought into the arbitration for the more effectively dealing with it are "the respondents." (f)

Applicant.
Respondent.

- (a) S. 7 (1) (d)
- (b) W. C. R. 1907, r. 4.
- (c) W. C. R. 1907, r. 6
- (d) First Schedule (8), W. C. R. 1907, r. 5 (1)
- (e) W. C. R., 1907, r. 10
- (f) W. C. R. 1907, r. 2 (1). *Post*, 716.

Chap. X.
Request for
arbitration

More persons than one may be joined as applicants. (a)
The test of whether the joinder is proper is whether
the joinder would be allowable under the County Court
Rules. (b)

Legal personal
representative.

If the legal personal representative makes the request
for arbitration he must file particulars of the dependants
on whose behalf he appears. (c)

If there is no legal personal representative the depen-
dants may themselves apply, (d) or any of them, the others
being named as respondents. (e)

"Dependants"
Application by
mother in life-
time of father.

In *Bevan v. Crawshaw Brothers*, (f) the deceased's
parents both survived. There was also another boy and a
sister. The father made a claim for compensation under the
Act. He then let the matter drop. The wife then took it up
and made the request for arbitration on the footing of
partial dependency. The County Court judge held that
the mother was in part dependent. Objection in the
Court of Appeal was now made that there was no power
to deal with the matter in the absence of the husband, and
the award was consequently bad. Collins, M.R., thought
the provision under rule 1 (3) (g) was "not so absolute as
was contended for." "He was not sure that the presence
of the husband (the father) was necessary to enable the
County Court judge to adjudicate on the questions involved
in the arbitration;" however, "the point not being raised

(a) W. C. R. 1907, r. 3. *Post*, 716.

(b) Order III, r. 1, C. C. Rules, 1903, Order XLIV, r. 18, 19.

(c) W. C. R. 1907, r. 4 (1). *Post*, 716.

(d) W. C. R. 1907, r. 4 (2).

(e) W. C. R. 1907, r. 4 (2).

(f) 18 T. L. R. 17, reported, but not on this point, under the name
Bevan v. Crawshaw Brothers, [1902] 1 K. B. 25.

(g) Now 4 (2).

at the hearing, it seemed to him no injustice was done by the award." The mother is a dependant (*a*)

Chap. X.
Request for
arbitration

In considering who are to be joined, those claiming to be dependants are to be included (*b*). The substantiation of the claim will be matter subsequent, when the award comes to be apportioned. Then the determination of the claim to rank as a dependant can be made matter for an arbitration, (*c*) in which the employer need not be made a party, (*d*) or, if made a party, may pay the amount of compensation into Court and have the proceedings against him stayed (*e*). If the workman leaves no dependants, his legal personal representative is the proper person to apply for the payment of the medical attendance and funeral expenses. If there be no such representative, then application may be made by any person to whom they are due, when all persons interested must also be joined, (*f*) and, if the compensation is not enough to pay the expenses in full, it shall be apportioned as the judge shall direct.

The applicant, having been determined on in the way indicated, must file the request for arbitration with the registrar of the County Court of the district in which all the persons concerned reside, or, if they reside in different districts, the district in which the accident occurred (*g*). The request must have appended particulars specifying—

Request for
arbitration.
Request for
arbitration.

- (1) The nature of the claim and the order the applicant claims.

- (a) S. 13 "dependants," "member of a family."
- (b) W. C. R. 1907, i. 1 (1). *Post*, 716.
- (c) W. C. R. 1907, i. 5 (1). *Post*, 717.
- (d) W. C. R. 1907, i. 5 (2).
- (e) W. C. R. 1907, i. 5 (3).
- (f) W. C. R. 1907, i. 6 (1). *Post*, 717.
- (g) W. C. R. 1907, i. 8. *Post*, 718.

Chap X.
Request for
arbitration.

- (2) The date of service of the notice of the accident, or if none, then the reason why.
- (3) The full names and addresses of the respondents and of the applicant and his solicitor, if any. (c)

We have before noted (b) the provision for the employer making the request for arbitration, the rules with regard to which are applications of those providing for the application by the workman. (c)

The request must be accompanied with particulars (d)

Copy for Judges

The applicant must deliver to the registrar a copy of his request and particulars for the judge or arbitrator, and a copy for each respondent. (e) If the applicant is illiterate and not able to write, the request and particulars and copies are to be filled up by the registrar's clerk (f) The respondent must then file his answer, in which any objection is to be stated (g).

(1) ARBITRATION.

The proceedings as to arbitration are provided for by the Second Schedule. (h)

Matters that
may be sub-
mitted to
arbitration

The matters that may be settled by arbitration have been enumerated (i) as follows

- (1) Liability.
- (2) Amount.
- (3) Duration.

(a) W. C. R. 1907, r. 8 (3) *Post*, 718. Forms are given—Appendix, Forms 1—11. *Post*, 707

(b) *Ante*, 609.

(c) W. C. R. 1907, r. 10 *Post*, 718

(d) W. C. R. 1907, r. 10 (2). *Post*, 719

(e) W. C. R. 1907, r. 11. *Post*, 719.

(f) W. C. R. 1907, r. 12. *Post*, 719.

(g) W. C. R. 1907, r. 17 (1). *Post*, 721.

(h) *Ante*, 335.

(i) *Cochrane v. Traill & Sons* (No. 2), 38 So. L. R. 18.

- (4) Dependency.
- (5) Apportionment amongst dependants.
- (6) Review.
- (7) Redemption.

The arbitrator may be -

- (1) Any committee which has been established by the employer and his workmen to settle matters arising under the Act (a) ^{various descriptions of arbitrators}
- (2) An arbitrator agreed on by the parties. *(b)*
- (3) The County Court judge. *(c)*
- (4) An arbitrator appointed by the County Court judge. *(d)*
- (5) In the case of the death or refusal or inability to act of an arbitrator the judge of the County Court may, on the application of a party, appoint a new arbitrator. *(e)*

In the case of a committee, if either the employer or the workman wishes, and the other does not object before the matter is brought before a conciliation committee, such committee, if they choose, may settle the matter at once. ^{Procedure of committee}

If they do not choose to undertake the reference, they may refer it to arbitration. By par. (2), if they refer the matter, the arbitrator to whom they refer it must be agreed on by the parties.

If the parties do agree, they are in the same position as if they had ignored the committee.

If they do not agree, they are equally in the same

(a) Second Schedule (1). *Ante*, 335.

(b) *Ib.* (2). *Ante*, 335.

(c) *Ib.* (2).

(d) *Ib.* (3). *Ante*, 336. This appointment is dependent on the rules to be issued authorizing it. See W. C. R. 1907, r. 29. *Post*, 730.

(e) *Ib.* (8). *Ante*, 337.

Chap. X. position as if no committee existed. And in either event
Arbitration. there is merely so much lost labour, beyond the possibility
 arising from the committee recommending an arbitrator.

On the other hand, the existence of the committee, and the confidence it may have engendered between workman and employer, may cause their disputes to be automatically referred to the committee, and hence a not inconsiderable gain would ensue.

**Arbitration
without
formalities.**

Where the arbitrator is (1) a committee, or (2) an arbitrator agreed on by the parties, the proceedings are to be carried on without any formalities prescribed, unless perhaps in the first case those indicated in the *Conciliation Act, 1867 (a)*

Powers.

There is no power to compel the attendance of witnesses, nor the production of documents, nor to make the witnesses who attend answer, nor to order and enforce the delivery of particulars. By 11 & 15 Viet. c. 39, sec. 16 "Every court, judge, justice, officer, commissioner, arbitrator or other person, now or hereafter having by law or by consent of parties authority to hear, receive and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively."

Appeal.

The Arbitration Act, 1889, (b) is not to apply to any arbitration under the Workmen's Compensation Act, 1906; but a committee or an arbitrator may, if they or he think fit, submit any question of law for the decision of the County Court judge, which shall be final unless there is an appeal to the Court of Appeal (c). They may also submit to a medical referee for report any matter which seems material to any question arising in the arbitration. (d) This power

(a) 30 & 31 Viet. c. 105.

(b) 52 & 53 Viet. c. 49.

(c) Second Schedule (4).

(d) Second Schedule (15).

is subject to Joint Home Office and Treasury Regulation, Chap. X. which must be referred to (a). It has been decided, perhaps somewhat superfluously, that the arbitrator is not bound to treat the report as conclusive (b). If he were, what profit in reporting? the matter would then be a reference. The doctor is not judge; at the highest he is but an assessor, on an issue in the case; and is in a quite different position from the medical referee, par. 15, (c) who is invoked by the parties, and whose decision is conclusive between them, as to the matters certified.

By the Second Schedule, par. 116, the Secretary of State may by order confer on a committee acting as arbitrators all or any of the powers conferred by the Act on County Courts or judges of County Courts, (d). He may also by order provide how and to whom the compensation money is to be paid where but for the order it should be paid into Court; and may exclude agreements submitted to the committee from the powers of revision of the registrar of the County Court or the judge under second Schedule, par. 116, (e) and (f). The Secretary of State's Order may further contain such incidental, consequential, or supplementary provisions as may appear to the Secretary of State to be necessary or proper for the purposes of the Order. At the time of printing these powers have not been exercised (f).

But when the amount of compensation is ascertained by the committee or agreed arbitrator, or any weekly payment is varied, or any other matter decided, a memorandum thereof is to be sent to the registrar of the County Court

(a) *Post*, 831.

(b) *Dowds v. Bennie*, 5 F. 268.

(c) First Schedule *Morton & Co., Ltd. v. Woodward*, [1902] 2 K. B. 276.

(d) *Ante*, 311.

(e) *Op. post*, 837.

(f) December, 1908.

Chap. X. for the district in which the person entitled to the compensation resides, and, subject to authentication, this shall be registered, (a) Upon which being done the memorandum shall be enforceable as a County Court judgment.

Enforcement of award This power of enforcement of the award as a County Court judgment seems the main benefit of this mode of procedure. If the sum arrived at as the compensation were the result of a voluntary agreement, it would be possible to dispute the binding character of it, and the cases noted under Proposition VIII of Chapter V., Part I (b) would have to be considered with reference to whether the agreement was a valid one or in full satisfaction or not.

The memorandum enforceable as a County Court judgment is free from these difficulties.

Committee arbitrator. It is to be noted that in the case of the existence of a committee, although neither party objects to the arbitration being settled by the committee, there is express power given to the committee to refer the matter "in their discretion to arbitration as hereinafter provided" (c). If either party objects the objection must be taken "before the committee meet to consider the matter" referred to them either by the employer or the workman (d).

Time of meeting of committee. No time is specified as necessary to intervene between the application by one party for arbitration and the consideration of the application by the committee.

There is not even any provision that when the committee is invoked by one party notice should be sent to the other party. It would be contrary to natural justice (e)

(a) Second Schedule (9). *Rule, 397.*

(b) *Rule, 116.*

(c) Second Schedule (1).

(d) *Id.*

(e) *Quicunque aliquid statuit, potest mandata aliorum. Propter hoc statuit, non equus fuit.*

cited from Seneca in Boswell's Case, 6 Co. Rep. 52a, and referred to in

to enter on an arbitration without full notice to both parties; (a) and the meeting of the committee which is to bind the parties to submit to the jurisdiction must be a meeting for the purpose of taking evidence and hearing the compensation, and not any preliminary meeting at which the request of one party for the committee to undertake the arbitration may be received, or any meeting for the purposes of fixing the day for the hearing or deciding upon the procedure to be adopted, since the words of par (1) (b) are "meet to consider the matter," that is, the main subject for consideration and not mere subsidiary inquiries. Thus either party, not otherwise committed, has a right to draw back until the matter is actually before the committee for hearing, and the matter which may be considered by the committee may be either the original application to fix compensation or subsequent arbitrations under par (15) or par. (16) of the First Schedule (c). The time that is allotted for appearance and to prepare for the arbitration must be a "reasonable time." (d)

Chap. X.

Arbitration

Matter for consideration.

If "the committee so refers the matter," by the next provision (c) the arbitrator is to be agreed on by the parties, or, in the absence of agreement is to be appointed by the County Court judge. In fact, the provision for the committee exercising a "discretion," if they do not wish to undertake the arbitration, is absolutely wise.

The rule merely gives to the committee a right that they have, quite independently of any rule or tendering

Comments

Bonaker v. Evans, 16 Q. B. 162 at 172 by Pollock, B., as "that great principle of justice."

(a) In *Bonaker v. Evans*, 16 Q. B. 162 at 171, Pollock, B., in delivering the judgment of the Court, cites *Bayly v. B.*, 10 *Capel v. Child*, 2 C. & J. 558, as saying that he knows "of no case in which you are to have a judicial proceeding by which a man is to be deprived of any part of his property without his having an opportunity of being heard."

(b) *Ante*, 335.

(c) *Ante*, 331.

(d) See *ante*, 191.

(e) *L. c.* (4). *Ante*, 335.

Chap. X. advice; and gives to the parties a right they also have,
Arbitration. independently of any rule, of rejecting advice when
 tendered. Whether the advice is rejected or accepted
 comes to exactly the same thing. A name or names are
 proposed, and, if one is agreed to, the parties are in the
 same position as if they had in the first instance set to
 find a person acceptable to both parties as their arbitrator.
 If one is not agreed to, then the compulsory powers of
 the Act come in, and the matter goes in due course before
 the County Court judge.

**Arbitrator
County Court
Judge or his
nominee**

One advantage there may be which may be noted. The
 suggestion in the Act of the committee as arbitrator may
 be acquiesced in since it is the suggestion of the Act, in
 that large class of cases where no strong feeling exists;
 whereas were there no provision of the Act pointing to
 such a mode of adjusting the compensation in every case,
 proceedings more or less resembling litigation would have
 to be taken.

Summary

The procedure may be thus summarized

- (1) The committee have an absolute right of refusing
 to undertake the arbitration—like any other body
 or person not bound by a legal duty to undertake
 anything.
- (2) If the committee refuse to undertake the arbitration,
 the parties are referred to an arbitrator whom they
 may agree upon; in the absence of an agreement
 an arbitrator is to be appointed by the County Court
 judge.
- (3) If the parties do not agree to go before the com-
 mittee, they may—
 - (1) agree on an arbitrator;
 - (2) if they do not agree they are to go before the
 County Court judge.

A well-known writer on the Act, whom it is not necessary further to identify, says that an arbitrator "is not bound by the legal rules of evidence." This statement is directly in conflict with the Act. *Davison*, (a) but derives what semblance of authority it has from *In re Kedgeby, Maxstead & Co.*, (b) which case would, however, receive full effect by interpreting the rule to be that in the case of an arbitrator the Court will not be astute to seek out technical deviations from the law of evidence in order to set aside an award, while yet it requires a substantial compliance with the general principles of evidence; and has jurisdiction to set an award aside in case of an infringement of them (c) *Arbitrium est boni viri arbitrium*, (d)—the arbitration of a competent man.

Where the arbitrator is either (1) the County Court Judge, (e) or (2) an arbitrator appointed by the County Court judge, whether originally or by substitution, the proceedings are regulated by greater formality.

Under par. (6) (f) rules have been made for the appearance of any party by representation.

A party may accordingly appear—

(1) In person.

(a) *McCl & Y.*, 160, 21 R. R. 771.

(b) [1893] 1 Q. B. 105.

(c) *East & West India Dock Co. v. Kent & Randall*, 12 App. Cas. 738. See Russell, on Arbitration (4th ed.) 101.

(d) *Per Dobbins, J.*, *Berry v. Perry*, 3 Bult. 64, 157.

(e) Or in Scotland the Sheriff, s. 11. By Second Schedule (17) (b). In Scotland an application to the Sheriff under the Act is to be carried through in the manner provided for by the Sheriffs' Courts (Scotland) Act, 1876 (39 & 40 Vict. c. 70), save only that the parties may be represented by any person authorised in writing to appear. The Sheriff may be required to state a case on any question of law determined by him to either division of the Court of Session, from whom there is an appeal to the House of Lords. Parts (1), (4), and (5) of the Second Schedule do not apply to Scotland. Second Schedule (17).

(f) *Ante*, 336. See also the Rules Publication Act, 1893 (56 & 57 Vict. c. 66); the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 14.

Chap. X.

Arbitration.

(2) By a solicitor.

(3) By counsel.

Or by leave of the judge or arbitrator, a party may appear—

(4) By a member of his family

(5) By a person in the permanent and exclusive employment of such party.

(6) In case of a company or corporation by any director or secretary, or any other person in the permanent and exclusive employment of the company or corporation.

(7) By any officer or member of any society of which such party is a member.

(8) Under special circumstances by any other person.^(a)

None of these classes save a solicitor is entitled to recover any fee for appearing.

Solicitor.

The County Court Act, 1888,^(b) sec. 72, permits a solicitor "acting generally in the action or matter," "but not a solicitor retained as an advocate by such first-mentioned solicitor," to appear. But "the right of a solicitor to address the court shall not be excluded by reason only that he is in the permanent and exclusive employment of any other solicitor."^(c)

In England by par. (3),^(d) a case of injury under the Act, instead of being settled by the judge of the County Court, may, if the Lord Chancellor so authorizes, be settled according to the like procedure by a single arbitrator appointed

^(a) W. G. R. 1907, 1, 33. *Post*, 732. See Law Times newspaper, November 14, 1908, p. 36.

^(b) 51 & 52 Vict. c. 41.

^(c) But see *The Queen v. Judge of County Court of Oxfordshire* (1891), 2 Q. B. 440.

^(d) Second Schedule, * *Ante*, 396.

by that judge, and the arbitrator so appointed shall have all the powers of the judge in the matter of the arbitration. The remuneration of an arbitrator appointed by a judge of County Courts is to be paid out of moneys provided by Parliament in accordance with regulations made by the Treasury (a)

Chap. X.
Arbitration

By par (b), "the judge of the County Court, or the arbitrator appointed by him, shall, for the purpose of proceedings under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the proceedings were an action in the County Court." (b)

Subject to the rules (and to the limitations of the Act), the procedure in an arbitration shall proceed in the same manner as an arbitration before the judge; but if before the day fixed for the arbitration the parties agree upon an award the judge may, with the consent of parties, settle it himself, and the functions of the arbitrator are to cease, and he is to be informed of the fact by the registrar; and any application for the enforcement of or for staying proceedings on an award shall in the case of an award made by an arbitrator be made to the judge. (c)

Procedure
prescribed by
rules.

Where any matter arising is not specially provided for under the rules, the rules made under the County Court Act, 1888, are to govern the procedure. (d)

When a party acts by a solicitor, service of any order or notice may be made by or upon such solicitor, in accordance with the provisions of Order xiiii. r. 6, and Order

(a) S. 10 (2) *Act*, 317.

(b) *Act*, 336.

(c) W. C. R. 1907, r. 81 *Post*, 731. "The proper construction to place upon the rule . . . is that, so far as the County Court rules apply to arbitrations, they are to apply to arbitrations under this Act" per Smith, L.J., *Mountain v. Fair*, [1899] 1 Q. B. 806.

(d) W. C. R. 1907, r. 80 *Post*, 762.

Chap. X. **Arbitration.** liv., rr. 1 and 3 to 6, and Order vii. r. 10, (or) of the County Court Rules, 1903. (*b*)

When the day is fixed for proceeding with an arbitration before an arbitrator appointed by the County Court judge, the registrar of the County Court is to send notice to the parties (*c*); and thenceforth the arbitration shall proceed in the same manner as in an arbitration before the judge (*d*).

Submission to a judge. If before the day appointed for the arbitration the respondent submits to pay a specified weekly sum, the judge may make an award for the same; (*e*) or if the respondent has paid money into Court further proceedings shall be stayed, and if an agreement is come to as to the apportionment and application of that sum an application may be made to the judge himself, in or out of Court, with the consent of all parties, forthwith to make an award for such apportionment and application. (*f*)

In any other case the arbitration may proceed as between the applicant and the other respondents (*g*).

The applicant may accept a payment in satisfaction in the Form 18 in the Appendix (*h*). The judge may also order the respondent who has paid money into Court to pay costs, but the applicant must give notice of his intention in his notice of acceptance. (*i*) This requisite, however, may be dispensed with in an emergency. (*k*) If the applicant does not accept, but elects to go on, the judge has a discretion as

(a) As to substituted service

(b) W. C. R. 1907, r. 78. *Post*, 562

(c) W. C. R. 1907, r. 14. *Post*, 520

(d) W. C. R. 1907, r. 31 (1). *Post*, 531.

(e) W. C. R. 1907, r. 18, (5) (a). *Post*, 521

(f) *Ib.* (b) (i). W. C. R. 1907, r. 31 (3) (a)

(h) W. C. R. 1907, r. 18 (3), (4). *Post*, 723.

(i) W. C. R. 1907, r. 18 (5) (c).

(g) *Ib.* (b) (v).

(k) *Ib.* (d).

to costs, and may give costs subsequent to the admission of liability to the respondent (a) Chap. X.
Arbitration

In the case of an award made by an arbitrator, any application for the enforcement of or for staying proceedings on the award is to be made to the judge (b)

The award of the judge must be in writing, sealed, filed and served on all persons affected thereby, and enforceable in the same manner as a judgment or order of the Court (c)

An arbitration may be stayed where several applicants are proceeding against the same respondent in the same Court in respect of matter arising in the same circumstances, pending the hearing of a test case (d)

The respondent replies to the application for arbitration by his answer. The answer may involve the admission that a claim for compensation has been made, as in *Lowe v. Myers* (e), but it need not be in writing.

If the respondent desires to disclaim any interest in the subject-matter of the arbitration, or intends to dispute his liability to pay compensation, he must, ten clear days at least before the day fixed for proceeding with the arbitration, file this with the registrar, stating the name and address of his solicitor (if any), and that he disclaims any interest in the subject-matter of the arbitration, or stating in what respect the applicant's particulars are inaccurate or incomplete, or stating concisely any fact or document which he desires to bring to the notice of the judge, or on which he intends to rely, or the grounds on and extent to which he denies liability (f). The observance of this rule, at least

- (a) W. C. R. 1907, r. 15 (3)
- (b) W. C. R. 1907, r. 11 (2) (b) *Post*, 731
- (c) W. C. R. 1907, r. 25 (1) *Post*, 729
- (d) W. C. R. 1907, r. 16 *Post*, 727
- (e) [1906] 2 K. B. 265
- (f) W. C. R. 1907, r. 17 (1) *Post*, 721.

Chap X.
Arbitration.

in the Southwark County Court in Judge Addison's time, had an important hearing on the question of costs. In that Court in a case where no answer was put in and the only point was the amount of the award on the taxation of costs, the respondents objected to the costs of the applicant and his witnesses who were not called. On the part of the applicant it was urged that he could not be expected to wait until five days† before the hearing of an arbitration before he subpoenaed witnesses. To this his Honour replied, "That is the fault of the rule. When you did not get an answer at the end of five days† you were entitled to take it that it was an intended action, and you should have countermanded the subpoenas. Then you would be allowed the costs you had incurred in summoning your witnesses and countermanding them, but only in those cases, where you were compelled to summon witnesses before the five days†. That would be a question for the learned registrar." My ruling is that the costs of any witnesses that prove anything which is admitted before the five days† preceding an arbitration—and everything, under this Act in the applicant's particulars which is not denied and taken as admitted by the respondents—cannot be allowed. But where a witness must be summoned before five days† in order to secure his attendance, if at the last moment his attendance is not needed, all reasonable costs of summoning him and of countermanding the subpoena may be allowed. In other words, the principle of the rule is that a person must not get up his case until the issue is decided, and that need not be done until five days† before the hearing, and he cannot be allowed costs incurred before that, except under exceptional circumstances." (a)

† Under the original rule—now altered to "ten days." Possibly the alteration was made to meet the suggested hardship of such a case as that in the text.

(a) *Times newspaper*, 31 January, 1891.

By rule 17 (1) (a) there is power for the County Court judge to amend. Chap. X.

In the Shoreditch County Court, in the case of *Silvester v. Cude*, (b) the County Court judge refused to allow the respondent to avail himself of a point he desired to raise, but of which he had not given the notice required by rule 17, and, further, refused to adjourn the arbitration so that the respondent might file an answer.

Arbitration
Amendment

On appeal, Smith and Rigby, L.J.J., were of opinion that "where the respondent failed to file an answer, the County Court judge might take either of the courses mentioned in the rule, but that he was not bound to take either. There seemed to be nothing compulsory in the rule." Williams, L.J., did not think it was necessary in this case to determine the meaning of the rule. The appeal was dismissed on "a finding of fact" by the judge. "But he (Williams, L.J.) wished not to be taken as agreeing that where the rule applied the County Court judge had jurisdiction to do anything except one or other of the two things mentioned in the rule."

Where a County Court judge becomes arbitrator (c) in the absence of agreement, the judge of the district in which all the parties reside or, if they reside in different districts, the judge of the district in which the accident to be arbitrated upon arose, is the arbitrator designated by the Act, but without prejudice to any transfer in manner provided by rules of Court. The rules of Court provide that if any judge is satisfied by any party in any matter under the Act pending in his Court that it can be more conveniently proceeded with in any other Court in England, Scotland or Ireland, he may order the transfer, (c) and the transfer is

What County Court judge to act.

(a) W. C. R. 1907. *Post*, 722. (b) 15 T. L. R. 131.
(c) W. C. R. 1907, r. 75. *Post*, 761.

Chap. X.
Arbitration

then to be made by the registrar as pointed out in the rule.

Proceedings may be taken under the Second Schedule, par. (11) -

- (i) in the Court of the district in which all parties concerned reside ;
- (ii) where they reside in different districts -
- (a) where the accident happened ;
- (b) or in the case of a workman who has contracted an industrial disease under sec. 8, in the district in which he was last employed in the employment to the nature of which the disease was due
- (c) in the case of accident at sea -
- (1) in the Court of the district where the ship was at the happening ;
- (2) of the ship's port of registry ;
- (3) where the workman or any of his dependants for whom the proceeding is taken resides or reside ; or

Officers of the
County Court
under their
several

Where a County Court judge, or an arbitrator appointed by him, is acting as arbitrator under the Act, the arbitration is to be dealt with as forming a part of the duties of the County Court, so as to secure the services of the officers *viz* Proceedings in an arbitration are to be within *l. c. R. 1903, Order LIII. in 7 & 8*, and the word "judge" in these rules is to include a committee and an arbitrator. These rules authorize the judge to allow the costs of "interrogatories and other matters required in the course of the proceedings."

Cost of
interrogatories.

Payment of
County Court
Judge's
expenses

When the County Court judge is authorized to appoint an arbitrator, and does appoint one under his authority, the

- (a) Second Schedule (11) *Ante*, 339, W. C. R. 1907, i 73.
- (b) *L. c. (12)* *Ante*, 339.

arbitrator so appointed is to be paid in accordance with a scale made by the Treasury (c). The Treasury prescribes four guineas a day as the rate of payment.

Chap. X
Arbitrator

There is no provision for the payment of any other arbitrator than one appointed by the County Court judge. With respect to his appointment, the Lord Chancellor may by general order with respect to any Court authorize the settlement by an arbitrator appointed by the judge of matters which in default of such authorization would be settled by the judge. Then the judge may himself either settle any such matter as it arises, or else with the approval of the Lord Chancellor appoint by writing under his hand, and filed in the Court, an arbitrator to settle the matter.

If no such general order is made, permission may be given to the judge to appoint an arbitrator for that arbitration. On death or refusal to act of an arbitrator appointed as above the judge may on the application of any party appoint a new arbitrator (e).

The judge shall return the copy of the request for arbitration to the registrar with the appointment of the arbitrator to be transmitted to him. The arbitrator is then to fix the day for the arbitration (f) and the registrar is to give notice to the parties in the Forms 12 and 13 (d).

Any arbitrator under the Act may state a case on a question of law for the decision of the County Court judge (g) of the district in which all the parties reside, or

Case stated to
County Court
Judge.

(d) S. 10(12). P.C. 317.

(e) W. C. R. 1907, i. 20(1) (b), (c), (d). P.C. 730.

(f) W. C. R. 1907, i. 30. P.C. 710.

(g) W. C. R. 1907, i. 14 (1), 720.

(e) Second Schedule (1). L.C. 330. "The words are "if he thinks fit." Under this the judge's discretion is only to see whether the facts bring the case within the reason of any rule or course of practice, if they do, it is obligatory to follow it.—The Queen v. Boteler, 1 B. & S. 259. *ante*, 588, to what is judicial discretion.

Chap. X. if they reside in different districts, of the district prescribed by rules of Court (a). He may not vary his award if it correctly expresses the meaning of his decision (b) but may "correct any clerical mistake or error in such award arising from any accidental slip or omission" (c).

Default of appearance. In Scotland it has been held that, if a respondent fails to appear, the arbitrator should not give judgment by default, but should ascertain the facts, and make an award on the case as proved before him (d). The Lord Justice Clerk's words are: "It is quite in the spirit of the Workmen's Compensation Act that one of the parties should place such confidence in the good sense and knowledge of the sheriff that he should take no part in the proceedings, but leave the sheriff to ascertain the facts for himself."

Though an arbitrator has no power to vary his award, he may yet entertain a subsequent claim by the dependants of a workman who has died from injuries in respect of which he has been awarded and received weekly payment (e). This is, however, quite plain from the words of the First Schedule (1) (a) (1)—"provided that the amount of any weekly payments made under this Act and any lump sum paid in redemption thereof shall be deducted from such sum."

Appeal to Court of Appeal. There is further an appeal to the Court of Appeal (f). As to which Smith, L.J., said in *Smith v. Lanes and Y. Ry. Co.* (g): "In cases under this Act, as in appeals

(a) *Re 111*—*ibid.*, 139.

(b) *Preston Building Co. v. Wm. Allsup & Sons*, [1905] 1 Ch. 141.

(c) W. C. R. 1907, i, 28 (2). *Per* 1729. See *Clutton & Sons v. Gordon*, [1901] 1 K. B. 694, 100 L. T. (Hobson) 1872, 11 Ch. D. 542.

(d) *United Collieries v. Gwyn*, 47 Sc. L. R. 47.

(e) *O'Keefe v. Lovatt*, 18 T. L. R. 57.

(f) Second Schedule (1) *ibid.*, 336. W. C. R. 1907, ii, 71, 72. *Post*, 758.

(g) [1898] 1 Q. B. 111 at 113, and see per Smith, L.J., *Rumbolt v. Rumbolt Colliery Co., Ltd.*, *Times* new paper, 6th February, 1899, 1 W. C. C. 28.

generally from County Courts, questions of fact are not the subject of appeal. The County Court judge has found the facts and has relegated them to an arbitrator, and we have to decide any question of law arising on them.

Chap. X.

Arbitration.

An appeal against a refusal to enforce an award lay to the Divisional Court, and not to the Court of Appeal (a). The test to be applied was, does the County Court judge sit under his statutory jurisdiction as arbitrator or by virtue of his general powers as a County Court judge, but in the Act of 1906 the words "or where he [the judge] gives any decision or makes any order under the Act" are added, and an appeal to the Court of Appeal is given from such decision or order. The effect of this is greatly to extend the jurisdiction of the Court of Appeal. For now any "ancillary matter which relates to securing the amount of the compensation when settled by the award" (b) is a "decision" or "order under the Act," and though formerly in such a case the appeal was to a Divisional Court it must now be taken directly to the Court of Appeal. The test, therefore, now is not whether the judge was sitting as arbitrator or not, but whether he was acting under jurisdiction given by the Act. The effect of this is to nullify the decisions in *Kniveton Northern Employers Mutual Indemnity Co., Ltd.* (c), *Morris v. Northern Employers Mutual Indemnity Co., Ltd.* (d), *Rugby and Co. v. Cox* (e) and *Gibson v. Wormald & Walker, Ltd.* (f).

Appeal from refusal to enforce award now to Court of Appeal

Any arbitrator under the Act may deal with the costs of the arbitration, but the costs are not to exceed the limits prescribed by rules of Court, and are to be taxed in manner

(a) *Badley v. Plaut*, [1900] 1 K. B. 31, n.

(b) *Per Collins, M.R.*, *Leach v. Lido & Health Assurance Association*, [1900] 1 K. B. 707 at 709.

(c) [1902] 1 K. B. 880.

(d) [1902] 2 K. B. 165.

(e) [1901] 1 K. B. 368.

(f) [1904] 2 K. B. 40.

Chap. X. provided by the rules, and the taxation may in all cases be
Arbitration reviewed by the judge of the County Court. (a)

Judge must take a note of both law and facts The judge shall make a note of any question of law raised and of the facts in evidence in relation thereto, and of his decision, and shall give a copy of his notes signed on application. (b)

Where County Court judge refuses to Act. If the County Court judge refuses to do his duty, the proper course is to apply to the Divisional Court under sec. 131 of the County Court Act, 1888. (c)

Appeal But if a claim at common law or under the Employers Liability Act fails, and application is at once made under the Workmen's Compensation Act, the judge becomes an arbitrator, and the appeal is to the Court of Appeal. (d)

An appeal lies to the Court of Appeal from an interlocutory order of an arbitrator, *e.g.* staying proceedings under the First Schedule, *per* (34) (e).

An appeal lies from the Court of Appeal to the House of Lords in England by virtue of the Appellate Jurisdiction Act, 1876, sec. 3, and in Scotland by the Second Schedule (17) (b), (f).

In Scotland direction to sheriff to state case

The Court of Session has refused to order the sheriff-substitute to state a case as to whether injury was attributable to "serious and wilful misconduct," since on the facts as found it was apparent that no question of law on the

(a) Second Schedule (7) *Ante*, 330.

(b) W. C. R. 1907, 11 *Tr. L.* 733.

(c) 51 A. & M. 111, r. 13.

(d) See *per* Lord Shand, *Hodkinson v. Newton, Chambers & Co., Ltd.*, [1901] A. C. 39 at 59. "The claim which was made under the Employers Liability Act of 1880, which failed, suddenly became before him a claim under the Workmen's Compensation Act of 1907, under which he came to act as arbitrator."

(e) Now *per* (14) *Welland v. G. W. Ry. Co.*, 10 T. L. R. 297, Osborn v. Vickers, Son & Mann, [1900] 2 Q. B. 91.

(f) *Ante*, 311.

construction of the Statute was raised (a). But under sec. 9 Chap. X of the Act of Settlement of the 3rd June, 1898, the Court of Arbitration Session directed a sheriff to state a case on a question formally submitted to him, since the question was one of, or might involve, a question of law. (b) Where a case stated was not in proper form, and was remitted to the sheriff for amendment, the Court held that neither party was entitled to costs in the appeal. (c)

At common law the authority of an arbitrator might be revoked at any time before the award was made, by any party to the submission. It, however, the submission contained a direct (d) or indirect (e) agreement to make it a rule of Court, such submission was irrevocable except by leave.

The exclusion of the operation of the Arbitration Act, 1889, would appear to render the rules of the common law applicable to an arbitration under this Act. This would not extend to the procedure before a County Court judge, which is provided for by the Act.

On a case stated by an arbitrator to a County Court judge, the judge sits in this matter as judge, and not as arbitrator. The procedure is in the nature of a case stated by justices for the opinion of the King's Bench Division.

On a case stated by an arbitrator to the County Court judge there is an appeal to the Court of Appeal. (f)

The procedure on the submission of a question of law to the judge is the same whether the arbitrator is one agreed on by the parties or appointed by the judge. The submission

(a) *Glasgow & South-Western Ry. v. Ludlow*, 2 F. 709.

(b) *Hobbs v. Samuel & Bradley*, 2 F. 711.

(c) *Murray v. Calderwood*, 1 F. 631.

(d) 1 & 1 Will. IV. c. 42, s. 39.

(e) *In re Mitchell*, 21 Q. B. D. 108.

(f) Second Schedule, par. (4). *Ante*, 336.

Chap X. is to take the form of a special case (a) to be signed by
Arbitration the arbitrator (b) On the hearing the judge may, after
 deciding the question submitted to him, remit the case with
 a memorandum of such decision to the arbitrator, for him to
 proceed in accordance with the same; but if the decision of
 the judge disposes of the whole matter, then he may himself
 make an award in the arbitration (c) The judge may
 remit the case to the arbitrator for restatement, (d) and
 shall have the same power over the costs as he has over the
 costs of an arbitration (e)

(5) *Costs.*

Costs The costs of and incident to the arbitration, and the
 proceedings connected therewith, are in the discretion of
 the arbitrator. They are in all cases, whether before an
 arbitrator or in the County Court, limited to the amount
 prescribed by rules of Court, and are in all cases to be
 taxed in manner prescribed by the rules, (f)

Taxation The costs of and incident to an arbitration are, in default
 of agreement between the parties, to be taxed according to
 such one of the scales of costs applicable to actions in the
 County Court as the judge or arbitrator shall direct
 The word "judge" in the rules is to include a committee
 and an arbitrator, presumably any arbitrator under the
 Act; (g) and the costs awarded by a committee or arbitrator
 must be taxed by the registrar and entered by him in the
 register; and are to be deemed part of the memorandum

(a) W. C. R. 1907, r. 32 (1) *Post*, 731.(b) *Ib* (1) *Post*, 732(c) *Ib* (5).(d) *Ib* (6)(e) *Ib* (7)(f) *Second Sched.*, par. (7). *Ante*, 536(g) W. C. R. 1907, r. 61 (1) *Post*, 753

and enforceable accordingly. (a) The committee, arbitrator or judge dealing with the question of costs may take into consideration any offer of compensation proved to have been made on behalf of the employer. (b) In default of a direction the costs are to be taxed according to the appropriate County Court scale. (c) If the subject-matter of the arbitration is not a capital sum, the committee, arbitrator or judge is to fix what is to be considered the subject-matter of the arbitration for the purposes of the taxation of costs. In default of such determination the amount is to be fixed by the registrar by whom the costs are to be taxed subject to review by the judge. (d)

Where the respondents have offered to submit to an award or made a payment into court, but the applicant has not signified acceptance of it, the arbitration may proceed; but if no greater sum than that offered is awarded, the judge may order any costs incurred by the respondent after notice of submission to an award or payment into court to be paid by any party who has not given notice of acceptance of such weekly payment or sum, and may order such costs to be set off against any other costs payable by the party, or to be deducted from the compensation. The costs of any party who has given notice of acceptance may be ordered to be paid by any other party who has not given notice, or to be deducted from the compensation awarded. (e)

In *Edenham v. South-Eastern Ry. Co.* (f) the defendants admitted liability but desired the Court to enter the award and sanction a division of the money, to which there was no

- (a) W. C. R. 1907, 1 (61) *Post*, 753.
- (b) *Ib.*, 1 (61) (3) (c) *W. v. Welland* (1) W. Ry. Co., 16 T. L. R. 297.
- (c) *Ib.*, 1 (61) (1).
- (d) *Ib.*, 1 (2) *Post*, 753.
- (e) W. C. R. 1907, 1 (5) (7) *Post*, 729.
- (f) Times newspaper, 28th Feb., 1899, 1 W. C. C. 151.

Offer to submit to award.

Commo's fee.

Chap. X.
Costs

*

objection. On the question of costs an objection was taken to counsel's fees. His Honour (Judge Addison, Q.C.) "thought it proper that counsel should attend on such an occasion, because one never knew what points might arise." "He would allow the applicants all the costs of that day, but not any that might have been incurred in preparing the case for trial, because the defendant company had admitted their liability seven days before the date of the hearing of the arbitration." "The Act (quarably his Honour said the rules *(a)*) did not allow any one to recover costs incurred before five days *(b)* of the hearing of the arbitration unless in exceptional circumstances, because all that was not deemed up to that time had to be taken as admitted" *(c)*.

Jurisdiction of
County Court
Judge as to costs

*

Chatworthy v. R. & H. Green, Ltd. *(d)* is important with regard to the County Court judge's jurisdiction as to costs. Employers having agreed with the widow of a workman who had been killed by an accident, that they were liable to pay the maximum compensation, withheld payment till she took out administration to the deceased. She refused, and filed a request for arbitration. The employers then paid the compensation into court under Workmen's Compensation Rules, 1898, r. 5 (3). The applicant thereupon claimed (1) costs up to the payment into court, (2) costs of the application for costs. The County Court judge ordered payment of both sets of costs. The employers appealed. The Court of Appeal affirmed the County Court judge. Collins, M.R., said *(e)* "Par. (ii) of Second Sched.

(a) W. G. R. 1898, r. 17 (1), (3). Now W. G. R. 1907, r. 17 (1) and 61 (1). *Post*, 722 and 733 respectively.

(b) Now "ten days"—W. G. R. 1907. *Post*, 722.

(c) W. G. R. 1898, r. 17 (3). The notation of the new rule is the same. *Post*, 722.

(d) 18 T. L. R. 611.

(e) *L. v. c.* at 642.

to the Act (of 1897) provided that the costs of and incident Chap X.
to the arbitration and proceedings connected therewith costs
should be in the discretion of the arbitrator. The County
Court judge clearly had jurisdiction over the costs of the
arbitration, and he had before him the fact that everything
was agreed between the parties except as to a condition
which ought not to have been imposed. It was not till the
applicant's attempt to obtain compensation had failed, and
she had been obliged to take proceedings under the Act,
that the employers paid the money into Court. It seemed
to him to be obvious that the County Court judge had a
discretion as to the costs up to the time of payment into
Court. But it was said that he had no right to order the
employers to pay the applicant's costs of the application
for costs. In his opinion, the provision as to payment of
money into Court operating as a stay *or* did not prevent
the County Court judge from giving the applicant her costs
up to the time of payment into Court, and also the costs of
her application.

The County Court judge in *Welland v. G. W. Ry. Co.* (a) fixed sum may
ordered a fixed sum for costs without taxation, and the be awarded for
Court of Appeal maintained his order, relying on the rule (c) costs.
that the judge or arbitrator in dealing with costs may take
into consideration any offer of compensation made by the
employer. In the case in question the order was for a
payment of £5. Had the sum awarded exceeded the limit
prescribed by the rules of court, the award would have
infringed on the statutory limitations of the arbitrator's
powers. (d)

(a) R. 5 (3). The notation is the same under the new rules. *Post*, 717.

(b) 16 T. L. R. 277.

(c) W. C. R. 1898, r. 33 (3). Now W. C. R. 1907, r. 61 (3). *Post*, 753.

(d) Second schedule, (7). *Ante*, 346.

Chap. X
Costs
Scales of costs

Three scales of costs are given in County Courts. The judge or arbitrator may direct that any one of these may be adopted. Failing any direction the taxation is to proceed as if the case were a County Court action, (a)

Taxation.

The registrar of the County Court has the duty, on application made to him, of taxing the costs awarded by an arbitrator agreed on by the parties (b). Application may be made to the judge to review any taxation of costs. This review, unless the judge otherwise directs, is to be on the evidence which has been brought in before the registrar. The costs of it are in the discretion of the judge. The result of the review must be entered in the register, (c)

Solicitor's costs

Where a solicitor is employed he may take out of Court or receive any sum payable into Court in respect of costs as if the payment was made in respect of costs in an action, (d)

In *Rigby & Co. v. Cox*, (e) under the old Act the County Court judge had laid down a general rule that the costs of an application under par. (12) of the First Schedule, to vary an award or to vary an agreement registered under par. (8) of the Second Schedule, should be taxed as a mere application in the matter of the arbitration and not as an original arbitration or proceeding. The Court of Appeal while dismissing the appeal on the ground that it ought to have been brought to the Divisional Court, yet intimated an opinion that the general rule was improperly laid down; and when the case came before them the Divisional Court so decided (f). The judge might order this in a particular case. He was wrong

(a) W. G. R. 1907, i. 61 (1). *Post*, 753.

(b) W. G. R. 1907, i. 62. *Post*, 753.

(c) W. G. R. 1907, i. 61 (1), 131 (3) (1).

(d) W. G. R. 1907, i. 64. *Post*, 753.

(e) [1903] 1 K. B. 558, 20 T. L. R. 196.

(f) [1904] 2 K. B. 208, 20 T. L. R. 161.

not to apply his mind to each particular and to enquire Chap X
to do that by a general direction which if he did at all costs
must be done by particular adjudication

Under this heading security for costs may also be treated.

In *Hall v. Snowden, Hubbard & Co.*, (a) it was contended ^{Security for costs} that an appeal under the Workmen's Compensation Act, 1897, should not be weighted by the liability to give security for costs. Smith, L.J., giving the judgment of the Court of Appeal, said (b) "The Legislature has in no way enacted that the ordinary rule of practice of this Court as to security for the costs of an appeal should be abrogated in such cases. The ordinary rule of the Court is that, except in applications for new trials, when the respondent can show that the appellant, if unsuccessful, would be unable, through poverty to pay the costs of the appeal, an order for security for costs is made. What is there to take the case before us out of that rule? It is clear that the appellant will be unable to pay to the respondents their costs of the appeal should it be unsuccessful, and, in my opinion, in this and similar cases, security should be ordered. If an appellant is in a position to obtain an order for leave to appeal *in forma pauperis*, he can do so, and no security would then be required, but I may point out that, in such a case, the respondent gets this protection: "that an appellant cannot obtain such an order without a certificate from counsel that the case is a proper one for appeal." Security to the amount of £15 was ordered.

In subsequent cases leave to appeal *in forma pauperis* has been given on making an affidavit, stating that the appeal is not by a trades union.

(a) [1899] 1 Q. B. 593

(b) *Ibid.* at 594.

Chap. X.

Co-is.
in case of a
new trial

In *Hall v. Snowden, Huddell & Co., Smith, L.J.*, (a) had noticed the exception to the rule requiring security for costs in the case of a new trial.

In *In re an Arbitration between Harwood and Abrahams*, (b) the contention was advanced that an appeal under the Workmen's Compensation Act, 1897, was analogous to an application for a new trial, and thus should be within the exception. The Court of Appeal would not accede to this. "The rule that security will not be required for the costs of a new trial of an action is somewhat anomalous." "There is no doubt as to the rule, but it is somewhat anomalous, and we think that it ought not to be extended." (c)

The exception itself was challenged in *Wrightwick v. Pope* (d) and the rule of practice originally laid down in *Heckscher v. Crosby* (e) was abrogated, with the concurrence of all the Lords Justices.

An order may accordingly in future be made for security for the costs of an application for a new trial.

Award in favour
of employer -
execution
stayed

In the case of an award in favour of the employers but execution stayed, the Court refused to order security for costs. The judge had neglect invited the workman to get the point of law settled, and he ought to be allowed to do this unconditionally (f). But this case was subsequently explained (g) to be an exception to the rule - which is that security will be ordered - usually to the amount of ten or fifteen pounds.

The Irish Courts adhere to their own rule of practice

- (a) *L. v. L.* (b) [1901] 2 K. B. 301
(c) *Per Collins, L.J., L. v. L.* at 305
(d) [1902] 2 K. B. 91 (e) [1891] 1 Q. B. 221.
(f) *Hibball v. Everett & Sons, Ltd.*, 16 T. L. R. 168.
(g) *Sheep v. Brotenvaux and another*, 19 T. L. R. 173

not to order security for costs on the ground of poverty alone. (a) Chap. X

The respondent to an appeal is allowed to appear *in forma pauperis* to resist the appeal without production of the opinion of counsel. (b)

The fact that a trades union is conducting the case on behalf of an appellant does not absolve from the necessity of giving security for costs. "The fact that the union had paid the costs in the County Court is no ground for supposing that they will pay them in the Court of Appeal." (c)

The costs as between the employer and the workman are provided for by the Second Sched., par. (7) (d). We are now to deal with the costs as between solicitor and client under par. (11), (e) noting by way of parenthesis par. (13) that no Court fee except such as may be prescribed under First Sched. par. (15), shall be payable by any party in respect of any proceedings by or against a workman under this Act in the Court prior to the award.

Three courses seem indicated (whether or not they were contemplated) here:

- (1) An award of costs by the arbitrator on the hearing; or at a new arbitration entered on to settle what the costs should be.
- (2) An application to the County Court judge after the registration of a memorandum has made the award enforceable as a County Court judgment; or perhaps an application to him in "any other matter," within par. (13). (f)

(a) See *Good v. Western Coal & Co., Ltd.* [1911] 1 K.B. 165, where it is said that it is not the practice of the Court to order security for costs on the ground of poverty.

(b) *Huddell v. George Hume & Co., Ltd.* [1907] 1 K.B. 181.

(c) *McLaughlin v. Clayton, Haddock v. Humphreys*, 1 W. C. C. 116, 117.

(d) *Ante*, 336.

(e) *Ante*, 340.

(f) *Ante*, 337.

Chap. X
COSTS

(3) An award of costs by the County Court judge sitting in the arbitration

In any case the costs awarded must be subject to taxation. (*a*)

The arbitrator or the County Court judge (*b*) would thus either award the costs between solicitor and client to be taxed, or would award costs not to exceed such an amount, subject to a further reduction on taxation if the costs properly incurred were shown not to amount to the sum provisionally awarded, or would award a sum which notwithstanding may be curbed in and reduced on taxation either apparently if it transends the notion of what the taxing officer looks on as suitable or the scale of costs prescribed by the County Court Rules. But in the event of the judge awarding a sum for costs, and the registrar disallowing a portion of it, there is an appeal to the judge who may set up the original amount, if that amount is not in excess of the costs prescribed by rules of Court. (*c*)

The costs given by a committee or an arbitrator other than one appointed by the judge of County Courts are now limited by the rules of Court and are to be taxed in the manner prescribed by the rules, and there is an appeal from the taxation to the judge of the County Court (*d*).

The procedure is probably modelled on that of the last sentence of sec. 118 of the County Court Act, 1888, (*e*) omitting the necessity for an application by either the

(*a*) Second Sched., (7) *Infra*, 130.

(*b*) And by par. (3) "the arbitrator appointed by the County Court judge shall, for the purpose of this Act, have all the powers of that judge." *Infra*, 531.

(*c*) Second Sched., par. (14).

(*d*) *Ib.*, par. (7) W.C.R. 1307, r. 61.

(*e*) 51 & 53 Vict. c. 43.

solicitor or the client, and adding the obligation of a **Chap. X.**
taxation in every case.

Costs

By Second Schedule, par. (11), the solicitor or agent of a person to whom any sum of compensation is awarded is not entitled to recover from him or to deduct from the sum awarded any amount whatever for his costs, except such sum as the committee, arbitrator or County Court judge may award (c). Where the sum awarded as compensation has been awarded by a committee or an arbitrator agreed on by the parties the application is to be made to such committee or arbitrator (a). The award is to be subject to taxation and to the Court scale of costs, (c).

Where the arbitration is in the County Court or before an arbitrator appointed by the judge of the County Court, application should be made to the judge or arbitrator "at or immediately after the hearing of the arbitration" (d). If made at a subsequent date it must be before the judge in court after notice in accordance with rule 18, (e) and where a sum has been agreed as compensation application should be made to the judge, (f).

The taxation is by the registrar, who shall record a **Taxation** memorandum of such order and amount in the register in which the sum payable as compensation is recorded. The person liable to pay compensation is not liable for costs to a greater extent than the compensation, or to pay an instalment larger than he is liable to pay for compensation. In case of default execution may issue, payment under which shall be *pro tanto* a discharge against the person entitled to such compensation. (g)

(a) *Ante*, 311, W. C. R. 1907, r. 65 (7) *Post*, 755

(b) *Ib.* 1. 65 (2) (c) *Ib.* (8) (d) *Ib.* (1) (a) *Post*, 755.

(e) *Post*, 742.

(f) W. C. R. 1907, 1. 65 (4).

(g) W. C. R. 1907, r. 66 (a) (b) (c) (d) (e) (f) *Post*, 756.

Chap. X
Costs.
Compensation
paid into
Court
When no
capital sum

When the compensation has been paid into Court the amount to which the solicitor or agent is entitled shall be paid out of it to him (*a*)

When the subject-matter of the arbitration is not a capital sum, the committee, arbitrator or judge must determine what shall be considered the amount of the subject-matter for the purpose of the allowance and taxation of the costs. In default of such determination the amount shall be fixed by the registrar who has to tax them, subject to review by the judge (*b*)

Order may be
made *hence*.

When an order for costs has been made, which may declare the solicitor entitled to a lien on the amount of compensation awarded, the registrar shall on application tax such costs; (*c*) and a copy of the order and a memorandum of the amount awarded by the registrar shall be issued by the registrar for service on the party liable to pay the sum awarded as compensation; (*d*) and the order and memorandum shall be recorded in the register (*e*). The party liable to pay such compensation shall on demand pay to the solicitor or agent the amount to which he is entitled out of the compensation, but not so that he is liable to pay any amount in excess of what he is liable to pay for compensation or in other instalments than those by which he is liable to pay the compensation (*f*). If he fails to do so, application may be made to the judge after notice under Rule 18, and on proof of service and demand of payment an order for payment may be made, and in default execution may be ordered to issue (*g*)

Payment made by, or execution levied on, the party

- (*a*) W. C. R. 1907, i. 146 (*q*) *Inst.*, 751
(*b*) Ib. i. 15 (*p*) *Inst.*, 755.
(*c*) Ib. i. 66 (*s*) *Inst.*, 756 (*d*) Ib. (*b*). *Inst.*, 756
(*e*) Ib. (*c*). (*f*) Ib. (*d*). (*g*) Ib. (*c*). *Inst.*, 756.

liable to pay such compensation is a valid discharge to him **Chap. X.**
as against the party entitled to such compensation to the ^{costs} ~~costs~~
amount paid or levied (a)

It remains to consider the provisions made as to costs ^{costs of} ~~costs~~ ^{alternative action}
when the procedure marked out by sec. 1, sub-s (1), (b) is
resorted to. An action under the common law or the
Employers Liability Act, 1880, having been dismissed, the
workman by that sub-section may claim to have compensa-
tion assessed under the Workmen's Compensation Acts. If
he does the Court "may deduct from such compensation all
or part of the costs which, in its judgment, have been caused
by the plaintiff bringing the action instead of proceeding
under this Act."

The costs of the alternative action are not separately dealt
with unless the judge can say that the costs incurred by
the action are not in excess of what would have been
caused by the arbitration alone—an affirmation that would
have appeared impossible had it not been made. (c) They
will in the first instance be fixed in the ordinary way by
taxation. If then the case goes further and the judge is
asked to award compensation, there will be the costs of the
alternative action to be dealt with. So far as they are costs
justifiable on the ground that they were occasioned under
the procedure of the Workmen's Compensation Act, 1906
in making out the workman's claim, they are to be
attributed to that and cancelled. So far as they are due to
the wrongfully bringing the action, they are to be deducted,
from the compensation awarded under the Workmen's
Compensation Act, 1906.

An appeal against an order for the deduction of costs

(a) W. C. R. 1907, r. 66 (f)

(b) *Ibid.*, 300

(c) *Cattermole v. Atlantic Transport Co.*, [1902] 1 K. B. 204 at 205 and
210. *Judicature Act, 1890* (53 & 54 Vict. c. 44), s. 5.

Chap. X. lies to the Court of Appeal and not to a Divisional Court. (a)

Costs.
Possible difficulties

The operation of the provision as to deduction of costs may prove somewhat complex—

- (1) If the abortive action is tried out with a jury in the High Court, by Order IV, r. 1, (a) the costs follow the event, unless the judge shall for good cause otherwise order.
- (2) If the abortive action is tried without a jury in the High Court, by the same rule, the costs are in the discretion of the judge. (c)
- (3) If the action is in the County Court, the costs are to be paid by or apportioned between the parties as the Court shall think just, and in default of any special direction shall abide the event. (d)

"May deduct"
"At liberty to deduct"

The expression "may deduct," i.e., "shall be at liberty to deduct," appears to confer a power—the judge shall have the power to deduct, and with the power there is the duty to exercise it in suitable cases. (e) But the power must be exercised on fixed principles, and consequently where there has been no misconduct on the successful respondent's part he is entitled to his costs, so far as they come within the provision of the section, and entitled to the deduction of them from the compensation payable. (f)

If then the employer has won a case before a jury, the

(a) *Williams v. Army and Navy Auxiliary Co-operative Society, Ltd.* 188 T. L. R. 408.

(b) R. S. C. 1883.

(c) *Adlington v. Conyueham*, [1892] 2 Q. B. 192.

(d) 51 & 52 Vict. c. 43, s. 113.

(e) Per Earl Cairns, L.C., *Julius v. Bishop of Oxford* 5 App. Cas. 214 at 225. *The Queen v. Boteler*, 1 B. & S. 959.

(f) Cf. *Cooper v. Whittingham*, 15 Ch. D. 501, *Jones v. Canning* 13 D. L. J. 262 at 263.

judge will, unless good cause is shown, be bound to Chap X.
determine what costs should be deducted from any com- costs
pensation the judge may award under the Workmen's Summary.
Compensation Act, 1906.

If the employer has won his case before a judge without
a jury, and the judge makes no order, there are no costs to
deduct.

If the employer has won his case in the County Court,
and the judge makes no order, the consideration of the
deduction to be made must be entered on; but if the judge
does make an order, the terms of the order determine the
course which is to be pursued.

In the case of compensation for total or partial in-
capacity, the payment must be by weekly sums for not less
than six months, so that the deduction in respect of costs
cannot be a lump sum deducted in the first instance, but
must take the form of a diminished payout, or the
subtraction of a portion of the weekly payment determined
on as compensation *ib*.

Where death has resulted from the injury, the compen-
sation is to be paid in a lump sum, and thus the costs
may be deducted at once.

It is, however, not doubtful that, whatever the theoretical
distinctions may be, this jurisdiction will be exercised
without undue deference to technicalities. *Cattermole v.*
Atlantic Transport Co. in the County Court is a shining
example of this *ib*.

The Court has to consider and judge of the matter; Judgment when
exercised, final.

(a) First Sched (b), (c) *ib*, 320, (b) (15). *ib*, 333

(b) *Cp. W. O. B.*, 1907, p. 65, 66. *ib*, 701

(c) First Sched (1) (a) (b) *ib*, 325. Second Sched (14) *ib*, 340.

(d) [1902] 1 K. B. 204

Chap. X. when it has done so and is arrived at a conclusion of fact, there is not any power to interfere with its exercise (*a*)

Costs
discriminated.

The costs recovered and the costs which there is a claim to deduct are not the same sum. The Court has to determine "in its judgment" how much of the costs of the abortive action are to be attributed to the plaintiff bringing his action, and to separate these from the costs which are common to the two procedures.

Taxation.

In the County Court the taxation of the costs of the abortive action could be undertaken at once by the registrar, (*b*) and the result would enable the costs incurred by bringing the action beyond those required to obtain an award under the Act to be readily discriminated. The judge could then make the actual deduction indicated. If the abortive action were tried on circuit there might be more difficulty. Probably when the case arises this will be obviated by the adoption of a practice like the old practice of the House of Lords in awarding costs, of allowing the deduction of a lump sum determined by the judge on a general view of the case and without any taxation.

The costs of the proceedings under the Workmen's Compensation Act, 1906, are to be taxed in manner prescribed by the Workmen's Compensation Act Rules, 1907, rr. 61, 62 (*c*).

Skeggs v. Keen & Co.

A curious point was raised in *Skeggs v. Keen & Co* (*d*). An action was brought under the Employers' Liability Act, 1880, when there was a verdict for the defendant with costs. The defendant, the employer, was all along willing

(a) *Thompson v. Lombard Deposit Bank*, 1 Ex. D. 401. *Goodwin v. Cluff*, 13 Q. B. D. 694.

(b) 61 & 62 Vict. c. 13, s. 118.

(c) Second Schedule (7). *Amal*, 396. W. C. R. 1907. *Post*, 723.

(d) *Times* newspaper, 21st February, 1899.

to compensate under the Workmen's Compensation Act, Chap X and compensation was assessed thereunder with costs. It was contended for the plaintiff that he was entitled to have all the costs which he might have incurred had he brought his claim originally under the Workmen's Compensation Act set off against the costs which he was liable to pay under the Employers Liability Act.

On the other side it was said that if the appellant had claimed under the Workmen's Compensation Act his claim would not have been disputed, so that but for his action in proceeding under the Employers Liability Act there would have been no costs. His Honor (Judge Adelson, Q.C.) took his view, and held "that it was the duty of an arbitrator or judge sitting as such) in applying this section (the 11th) to enter upon these inquiries, so as to ascertain the costs which had been caused by the proceedings under the Employers Liability Act." He found as a fact that the costs which the respondents had incurred had been occasioned by the appellant bringing his action under the Employers Liability Act, 1880. He further decided that there was no jurisdiction to give the appellant costs.

The appellant then went to the Court of Appeal, (a) contending that there was jurisdiction to allow the workman his costs in respect of the assessment of compensation. The Court decided that it was unnecessary to give a decision on his point of law, because "it was clear that considering how the appellant persisted in going on with his claim under the Act of 1880" the order was a perfectly right order. Egby, L.J., however, said "the inclination of his opinion as to where compensation was assessed under sec. 1, sub-se. 1 of the Act of 1897, the workman was not entitled to any costs. That sub-section did not seem to him to give the

(a) Times newspaper, 19th June, 1899, 1 W. C. C. 35.

Chap. X.
Cotton,

workman any such right to costs as he would have had if there had been proceedings to assess compensation under the Act. The only proceeding in the case was the action under the Act of 1880, which action failed. The sub-section gave the judge power, in dismissing the action, to assess compensation under the Act of 1897, but it did not say that the workman was to have any costs in addition to the compensation."

Cattermole v
Atlantic
Transport Co

The point, however, came up in the Court of Appeal in *Cattermole v Atlantic Transport Co* (a). An action was brought before Judge French in the Bow County Court under the Employers Liability Act, 1880 and Lord Campbell's Act, and failed. Then at the request of the plaintiff compensation was assessed under sec. 1, sub-sec. 1 of the Workmen's Compensation Act, 1897. A certificate was given for £231, and an order made that the defendant should pay to the plaintiff her costs of and incident to the proceedings. The employers appealed on the strength of the view taken by Rigby, J. J. in *Skegges v Koen*, Stirling, J. J. (a) in giving the judgment of the Court, says, "In *Skegges v Koen*, Rigby, J. J., held that the enunciation of his opinion was to that effect [i.e. that the power of the judge to deal with compensation is entirely derived from sec. 1, sub-sec. 1]—but neither he nor any of the members of the Court gave a decision on the point. If this contention be well founded, the result will be that the workman not only will be liable to have all costs caused by his bringing the action instead of proceeding under the Act deducted from the compensation, but will have to bear all his own costs, although successful in recovering compensation; whereas, according to the ordinary practice as regards costs, he ought to have the costs of successful proceedings, except

(a) [1902] 1 K. B. 204, *McKenna v United Collieries, Ltd.*, 81 (a).

(b) 1 W. P. C. 35.

(c) [1902] 1 K. B. at 209.

in so far as they are increased by any part of these proceedings which fails, and ought to bear all costs occasioned by such failure." "In our judgment the effect of the subsection is to leave the Court in which the action is tried full liberty to exercise any power of awarding costs which it may have in the action, and to confer the additional power of deducting from the compensation costs caused by the plaintiff bringing the action instead of proceeding under the Act." "In general the Court to try such actions is a County Court." "The County Court has power to deal with the costs of the action, including the proceedings for the assessment of compensation under sec. 1, subsec. 1 of the Workmen's Compensation Act, 1897." "It the Court in which the action is tried be the High Court . . . the High Court has full power to deal with costs under sec. 5 of the Judicature Act, 1890." "The learned judge has dismissed the action, but has ordered the defendants to pay all the costs of the proceedings, and has not ordered any costs to be deducted from the compensation." "In general this would not be right, but such an order may be justified by special circumstances, as if, for example, the judge were satisfied that no costs had been caused by the plaintiff bringing an action instead of proceeding under the Act." "This matter is one within the discretion of the judge; it has not been shown that the judge exercised that discretion on a wrong principle." (a)

Chap. X.

costs

The certificate of the judge of the compensation awarded under the provisions of this section is to have the effect of an award under the Act. (b) An award under the Act, in order to become enforceable, has to be embodied in a memorandum and sent in manner prescribed by rules of court "by the committee or arbitrator, or by any party

Judge's certificate
in award

(a) *L. C.* at 211. (b) S. 1, sub s. 1. *Ante*, 301.

Chap X. interested, to the registrar of the County Court"; and the
Costs registrar is to record such memorandum in a special register, without fee, and thereupon the memorandum is to be enforceable as a County Court judgment, *so i.e.* by ordinary process of execution, &c.

The certificate and its registration are provided for by rule 81. (*b*)

(d) MEMORANDUM.

Definition. The memorandum is the record of the decision or award of the committee, arbitrator, or of the terms of an agreement come to as to the compensation payable, or any weekly payment varied, or any other matter decided under the Act (*e*)

Registration of. The proceedings under the Act are to be recorded in the books of the Court as other proceedings in the Court are recorded (*d*) There is also to be a special register kept by the registrar of the County Court for the district in which a workman or dependant receiving the benefit of the award resides, *so* and without fee (*f*)

The memorandum when registered becomes for all purposes enforceable as a County Court judgment The award of a judge on any arbitration is enforceable as a judgment without registration on being "sealed and filed" and "served on all persons affected thereby"; (*g*) incidentally, however, registration of a memorandum becomes necessary by reason

(a) Second Schedule (ii) *Ante*, 347

(b) W. C. R. 1907. *Post*, 763

(c) Second Schedule (ii) *Ante*, 347.

(d) W. C. R. 1907, r. 81.

(e) Ib. r. 73 (i) *Post*, 759.

(f) Second Schedule (ii)

(g) W. C. R. 1907, r. 28. *Post*, 729

of rule 81, (a) requiring that proceedings under the Act Chap X. "shall be recorded in the books of the Court in the manner ^{of memoranda} in which other proceedings in the Court are recorded."

The requirements of the memorandum under the Second Schedule, par (b), are specified in r. 11, (b). Where the matter is decided after a medical referee has been appointed to report under par. 15a, a copy of the report is to be annexed to the memorandum and recorded with it, (c). If within seven days after notice by the registrar to parties interested of the memorandum having been received the parties do not dispute its being recorded the registrar is to record it without further proof (d). Unless the registrar considers that it ought not to be registered by reason of (a) the inadequacy of the amount, or the fraud or undue influence or other improper means (e).

In either event he is to refer the matter to the judge, ^{inquiry} and the procedure is then under r. 19. The registrar reports to the judge in writing, and informs the parties according to Form 11 (f). An inquiry is then held, and on the hearing the judge may make such order or give such directions as he may think just, (g).

The judge himself has a substantive power (h) within six months after a memorandum has been recorded of ordering the record to be removed on proof that the agreement was obtained by fraud or undue influence or other improper means, (i) and he may at any time rectify the register (k).

If any party interested disputes the genuineness of the

(a) W. C. R. 1907. *Post*, 763. See Bailey v. Plant, 17 T. L. R. 449.

(b) W. C. R. 1907. *Post*, 740. (c) 1b (1) (2). (d) 1b r. 14.

(e) Second Schedule (3) (d). *Ant.*, 338. (f) W. C. R. 1907. *Post*, 815.

(g) W. C. R. 1907, c. 49 (1). (h) 1b (7).

(i) Second Schedule (3) (e). W. C. R. 1907, c. 50, incorporating the procedure of r. 48.

(k) 1b (c).

Chap. X.

Memorandum

memorandum or its effectiveness, and objects to its being recorded within seven days of the receipt of the memorandum sent out by the registrar, he shall file with the registrar a notice in the Form 38(a) that he disputes the genuineness of the memorandum, or that he objects to its being recorded (b). The matter is then to be heard, (c) and the judge may make such order or give such directions as he may think just (d).

What recorded

It is the duty of the registrar (e) to record a memorandum signed by the chairman and secretary of the committee or by the arbitrator without further proof of its genuineness, and of these functionaries to draw up the memorandum, and to procure the same to be put in train for registration (f).

Proof required of genuineness

Dispute as to genuineness

A memorandum of a verbal agreement has been held in Scotland (g) within the Act, and matter to be recorded, in proof of its genuineness. If the memorandum embodies an agreement signed by all parties, the registrar must record it without further proof (h). If the genuineness of the memorandum is disputed, unless the objection is withdrawn in writing, registration shall only be by order of the judge, (i) but if it is withdrawn the memorandum is to be recorded without further proof. But if a consent cannot be obtained any party interested may apply to the judge to order the memorandum to be recorded.

Collins, M.R., in Field v. Longden & Sons.

The dictum of Collins, M.R., in *Field v. Longden & Sons*, (d) If the workman gave notice that he proposed to

- (a) *Post*, 14. (b) W.C.R. 1907, 646. (c) *Ib.*, 484.
 (d) *Ib.* (d).
 (e) W.C.R. 1907, 644, 645. *Post*, 711.
 (f) *Ib.*, 42 (1). *Post*, 711.
 (g) *Corbanc v. Trull* (No. 3), 38 Sc. L. R. 848.
 (h) W.C.R. 1907, 144.
 (i) *Ib.*, 116, 117, (1) (2). *Post*, 713.
 (k) [1903] 1 K. B. 47 at 51.

and in for registration a memorandum of an agreement for Chap. X.
 payment of these amounts weekly during incapacity as ^{Memorandum}
 compensation, and the employers were to say that there
 was no such agreement, then it appears to me that at once
 there would be a dispute, and a question would have arisen
 within sec. 1, sub-sec. 3," presents difficulty unless con-
 sidered with reference to the last cited rules. They supply
 the method for dealing with such a case. The dictum of ^{The dictum of the}
 the M.R. does not intimate that a party dissenting from the ^{Memorandum}
 terms of a memorandum can, without further facts, finally
 prevent its registration and can throw the whole matter open
 for litigation. His power is very manifestly limited to com-
 pelling the matter to be brought before the judge, who will
 decide, not on the general matter, but on the special issue
 of the genuineness of the memorandum. If in the opinion
 of the judge the memorandum was not a record of either
 award or agreement, the judge would not order it to be
 registered and the matter would be at large. If in the
 opinion of the judge there was such agreement, notwith-
 standing any dissent, he would order it to be recorded.
 Test it this way. Assume a memorandum recording an
 actual agreement valid in all respects. The employers say
 "there is no such agreement." Clearly there is a dispute.
 Equally clearly not within sec. 1, sub-sec. 3. The question
 is not "as to the liability to pay compensation," nor yet "as
 to the amount," nor yet "as to the duration of compensation,"
 but as to the existence of the alleged agreement, (a)

The reason of the decision in *Jones v. Great Central Ry.*, (b) decided simultaneously with *Field v. Longden & Sons*, now becomes important. Here the employers

(a) *111 Clifworth v. R. & H. Green, Ltd.*, 18 T. L. R. 614, where the employers sought to attach an illegal condition to their payment. *Calodon Shipbuilding & Engineering Co., Ltd. v. Kennedy*, 8 F. 960

(b) 18 T. L. R. 614.

Chap. X
Memorandum

1

presented a memorandum, which the workman refused to sign. They showed the claim and the facts that they had not disputed it and had paid it for many weeks. The registrar, however, refused to record it, and was supported by the judge. The Court of Appeal, notwithstanding, directed registration. There was, indeed, this objection by the applicant—he said there was no such agreement—but the facts showed that his claim was admitted—there was an agreement. The memorandum was genuine, and consequently no dispute, so far as material for arbitration went, though matter for the judge under 11-13 and 14.

Workman
entitled to have
memorandum
registered

In the Scotch case of *Dunlop v. Ranken & Blackmore*, (1911) a workman who had been injured in the course of his employment got a letter from his employers: "We admit liability under the Workmen's Compensation Act 1897, and are prepared to pay compensation at the rate of 12s. 8d. during incapacity in terms thereof."

After paying for some months the employers discontinued, on the ground that the workman was now well. He thereupon applied to the sheriff for arbitration, maintaining that he was still disabled. The sheriff assuaged the employers, but stated a case. The Court of Session held that the workman had mistaken his procedure. The letter constituted an agreement, and thus the injured party was entitled to have registered. Moreover, the course that the workman had adopted had not superseded the agreement, which it was still competent for him to get registered. In

Lawrie v. James Brown & Co.

Lawrie v. James Brown & Co., (1914) one of the terms of an only recorded memorandum was that the employers agreed to give the workman "regular employment" at specified

(a) 1 F. 201. *Colville v. Tague*, 8 F. 179. If the sheriff thought that there was no subsisting agreement, his duty was to proceed to arbitration under s. 1, sub-s. 3, *Dunlop v. Ranken & Blackmore*, 144, 150, 151, 152, 153.

(b) 15 Sc. L. R. 432.

work. After nearly three years' employment there was a dispute and the workman was dismissed. The workman brought his action. The Court of Session held that the only remedy was under the memorandum. The Court was further of opinion that "regular employment" was only distinguished from "occasional" or "intermittent," and as no term was fixed that the employment was necessarily employment at pleasure. Lord Ardwell thought on the first point that, as there was no procedure under the Workmen's Compensation Act for working out such a claim, if good, it was not incompetent to seek it in an ordinary Court of Law.

Chap. X.
Memorandum.

Adopting a wrong remedy was also the vice in *Pyrie v. Lord (McC. & Landis)* (a). There it was admitted that the memorandum had been superseded by fresh agreements, but it was successfully contended that while the recorded agreement remained on the register, as the workman was again totally incapacitated he was still entitled to enforce it. By the Act neither an agreement for the redemption of a weekly payment by a lump sum, (b) nor yet the payment of the sum, will exempt the person by whom the weekly payment is payable from liability to continue the payment unless the agreement is registered, and there is the same invalidity in the case of an agreement for compensation to be paid to a person under a disability or to dependent persons where it is not registered, unless failure to register is due to neglect or default of the person by whom the weekly payment is payable.

Adopting a wrong remedy.

The only issue on an application for the registration of a memorandum—so it has been decided in Scotland—is that of genuineness. The sheriff has no power to increase or diminish the amount, or to attach conditions to its

Only issue genuineness.

(a) [1908] S. O. 431.

(b) Second Schedule, par. (10).

Chap. X
Memorandum

registration. Is it genuine? is the sole question he has to concern himself with, (a) "The respondents," says Lord Adam, (b) "have a perfect right to dispute its genuineness, that is, as I understand, either that there was no agreement at all, or that, if there was, the memorandum does not truly set forth its terms."

Cochrane v. Traill (No. 2).

A memorandum was sent to the sheriff clerk for registration, which he refused to record, because the genuineness was disputed. An application was then made to the sheriff for a special warrant to register the memorandum. The sheriff refused to entertain the application until the applicant had paid the expenses of a former unsuccessful action in the Court of Session. The Court of Session held that on an application for a special warrant to register a memorandum of agreement, the sheriff is not acting as an arbitrator under the Act, and that, therefore, an appeal would not lie; but they added an expression of their opinion that the only question for the sheriff, on such an application, was whether the agreement was genuine. (c)

Cammick v. Glasgow Iron & Steel Co.

In *Cammick v. Glasgow Iron & Steel Co., Ltd.*, (d) doubt was expressed as to the correctness of the holding in *Cochrane v. Traill* (No. 2) that an application to register to the sheriff, in the exercise of his ordinary common law jurisdiction, was correct. The Lord Justice Clerk explains the effect of the registration of the memorandum: "The placing of a memorandum of agreement on the register is in the nature of a ministerial and administrative act, by which, while it subsists, it can be made legally operative. It in no way prejudices the rights of the parties, for a party can at once apply to have the arrangement made by it modified, or put an end to, if grounds can be stated for

Registering
merely
ministerial.

(a) *Cochrane v. Traill* (No. 2), 3 F. 27.

(b) *Ib.* (No. 2), 3 F. 1091.

(c) *Ib.* (No. 2), 3 F. 27.

(d) 4 F. 198.

doing so." "The registration can fix nothing for the future, but can only fix what was the agreement made in the previously existing circumstances."

Chap. X.
Memorandum

Under the Act of 1897 it was decided in *Bunning v. Easton* (a) that where the genuineness of an agreement was disputed and the sheriff (under the Act of Settlement of 3rd June, 1898, sec. 7 (a)) refused to grant a warrant for the registration of a memorandum, there was no appeal, because the warrant was ministerial, and the sheriff does not act as arbitrator, and this was followed in *Lochgelly Iron and Coal Co. v. Shuckler* (b).

Bunning v.
Easton.

Lochgelly Iron &
Coal Co. v.
Shuckler

The registrar may not refuse to record the memorandum only on the ground that through altered circumstances the workman is no longer entitled to the amount of compensation fixed by the agreement. The way to put an end to a memorandum is by showing that a new agreement has been made between the parties. The registration of a memorandum is different from the registration of an agreement. The only thing material in the former is to be satisfied that the record is correct: not that the agreement is applicable to the present circumstances. (c)

But by the Act of 1906 (d) where a workman seeks to record a memorandum of agreement between his employer and himself for the payment of compensation, and the employer, in accordance with rules of Court, (e) proves that the workman has, in fact, returned to work and is earning the same wages as he did before the accident, and objects to the recording of such memorandum, the memorandum is only to be recorded, if at all, on such terms

(a) 8 F. 107.

(b) [1907] S. C. 3.

(c) *Blake v. Midland Ry. Co.*, [1904] 1 K. B. 503.

(d) Second Schedule, par. (2) *Rand & Co. v. Stevenson*, [1907] S. C. 1259.

(e) W. O. R. 1907, 1r. 41, 42, 43, 44, 45, 46, 47.

Chap. X. as the judge of the County Court under the circumstances
Memorandum may think just. (a)

Is application
for registration
a "proceeding"

There is a difference of opinion whether an application to record a memorandum is a "proceeding for the recovery . . . of compensation." (b) In Scotland this has been concluded in the negative, with the result that the objection that there was no claim within six months of the accident is not good. (c) In *Manno v. Workman*, (d) however, the Irish Court of Appeal held that an application to record the memorandum was a proceeding for the recovery of compensation under the Act, and, as in that case no claim had been made within the six months, they therefore refused the application.

Award enforced
by judgment
summons

In *Johnson v. Adshhead* (e) the question was raised whether a workman could enforce an order made under the Workmen's Compensation Act by means of a judgment summons. The Second Schedule, par. (8), (f) provided that the memorandum "shall for all purposes be enforceable as a County Court judgment," and "nineteen out of twenty judgments obtained in the County Court were enforced by judgment summons." The difficulty had arisen, in the opinion of Judge Badbury, owing to the fact that, under the rules and forms provided in the Workmen's Compensation Act, there was no form, and there was no rule which dealt with procedure by judgment summons. Rule 19 dealt with execution as a mode of enforcing an award under the Compensation Act, and there was a form given for a

(a) Second Schedule, par. 10 (b). *Id.*, 337.

(b) S. 2, sub-s. 1. *Id.*, 301.

(c) *Cochrane v. Trill*, 2 F. 794.

(d) 84 Ir. L. T. R. 14. (e) 103 L. T. newspaper, 40, 2 W. C. C. 158.

(f) Now Second Schedule, par. (9).

execution, but nothing about enforcing an award by means of a judgment summons (a) Chap. X.

Memorandum

Judge Yates-Lee came to the opposite conclusion in *Bailey v. Plant* (b) but was reversed on appeal (c). The governing purpose in the making of a committal order is to put pressure on the debtor to make him pay the debt, and is substantially civil process and not merely punitive. The case was accordingly sent back to the County Court judge, who still refused to make an order, alleging two grounds of objection (d).

Award itself may be sent for re-attachment instead of the memorandum.

- (1) That the provision of the Second Schedule, par. (8), (e) did not apply, because, though the award itself had been sent, there was no memorandum of it.
- (2) That the provisions did not apply where the arbitrator was appointed by the judge, or the judge acted as arbitrator.

In the Divisional Court, to which the appeal was held to lie, these objections were overruled. In the opinion of the Lord Chief Justice "The paragraph provided that a memorandum of the award should be accepted in order to prevent the necessity of sending the more formal document. The best memorandum of the award was, of course, the award itself."

Where proceedings by way of judgment summons under sec. 3 of the Debtors Act, 1869, (f) are taken the County Court Rules are to apply. (g) But the Court has no power to alter the terms or mode of payment of any sum to

(a) See per Romer, L.J., *Powell v. Main Colliery Co.*, [1900] 2 Q. B. at 161.

(b) 109 L. T. newspaper, 254, 2 W. C. C. 160.

(c) [1901] 1 K. B. 31. (d) 17 T. L. R. 119.

(e) New Second Schedule, par. (9).

(f) 32 & 33 Vict. c. 62. (g) W. C. R. 1907, r. 68 (1). *Post*, 757.

Chap. X.
Memorandum

become payable in future under any award, memorandum or certificate, otherwise than by consent or under the First Schedule, par. (16), whereby any weekly payment may be reviewed at the request either of the employer or of the workman. (a)

(7) COUNTY COURT JURISDICTION

County Court
the prevailing
forum.

However resolute the intention of the framers of the Act may have been to eliminate formal legal procedure from the Act, and to constitute conciliation committees or private arbitrators the resort in the bulk of the cases, the convenience of the County Court procedure has been recognized to an extent that is almost universal. (b) Consequently there is no need to do more than indicate these alternative tribunals.

Committee.

Possibly the reference to the "committee" in the Act (c) may have primarily been intended to indicate the Comenets of Conciliation made, the Comenets of Conciliation Act, 1867. (d)

Arbitration.

There is also power under the Arbitration (Masters and Workmen) Act, 1872, (e) to conduct an arbitration mutually binding.

Refusal to
arbitrate

In Scotland I have been informed that there is a decision that before a matter under the Act can be entertained by the Sheriff Court there must be a refusal to arbitrate. If this were ever a possible construction, and the view no doubt grew in the first instance out of the

(a) W. C. R. 1907, r. 64 (1).

(b) During the year 1901, according to the Parliamentary Return for that year, there was not a single memorandum registered of an arbitration before a committee, and only thirteen by arbitrators, while there were 1,289 cases decided by County Court judges, and nine by special arbitrators.

(c) Second Schedule, par. (1). *Ante*, 335

(d) 30 & 31 Vict. c. 105.

(e) 35 & 36 Vict. c. 46.

strongly emphasised intention of the authors of the Act to Chap. X.
 dispense with legal assistance, the practice in England has County Court
jurisdiction
 been so uniform to the contrary that such a view would
 now be impossible to maintain. In any view the require-
 ment of an objection to arbitration in order to found juris-
 diction by inserting a formal and additional step in the
 order of procedure could only increase expense.

An arbitrator, whether private or appointed under the
 Second Schedule, par. 13), may submit any question of law
 to the County Court judge (a).

The judge sits in this matter as judge, and not as County Court
judge sits as
judge on sub-
mission of
point of law by
private
arbitrator
 arbitrator, as he does when himself called on to assess
 compensation under the Act (b). The procedure is in the
 nature of a case stated by justices for the opinion of the
 King's Bench Division.

On a case stated by an arbitrator to the County Court Case stated by
arbitrator.
 judge there is an appeal to the Court of Appeal (c).

The procedure on the submission of a question of law to
 the judge is the same whether the arbitrator is one agreed
 on by the parties or appointed by the judge. The sub-
 mission is to take the form of a special case (d) to be signed
 by the chairman and secretary of the Committee or by the
 arbitrator (e). On the hearing the judge may, after deciding
 the question submitted to him, remit the case with a
 memorandum of such decision to the arbitrator, for him to
 proceed in accordance with such decision; but if the
 decision of the judge disposes of the whole matter, then he
 may himself make an award in the arbitration (f). The judge
 may remit the case to the arbitrator for restatement, (g) and

(a) Second Schedule, par. 13). *Ante*, 336.

(b) *Mountain v. Farr*, [1891] 1 Q. B. 805. 101 *Ante*, 634.

(c) W. G. R. 1907, 1 32 (1). *Post*, 731. 102 (3) *Post*, 732.

(d) *Ib.* (5). (g) *Ib.* (6)

Chap. X
County Court
Jurisdiction.

shall have the same power over the costs as he has over the costs of an arbitration. (a)

But save where the Committee or the arbitrator submit any question of law for the decision of the judge of the County Court there is no appeal from their decisions. It was urged that this view gives to the arbitrator appointed by the County Court judge greater immunities than the judge himself has; while the intention to assimilate his functions to those of a judge is manifested by the provision of par. (3) that he is to have "all the powers of that judge." To this it was answered that "the legislature had before them the view that proceedings under the Act were generally to be by arbitration before a committee or an arbitrator and not proceedings of a technical legal character. The primary idea seems to have been that of an arbitration not open to review, and dealt with by non-technical process," and this view has prevailed. (b) But the true bearings of this decision must not be mistaken. A large number of the appeals from the County Courts are from decisions of deputies acting for the County Court judges. It is obvious that these decisions are appealable. The authors of them sit indeed as arbitrators, but, though the point seems verbally a fine one, they sit as deputies of the County Court judges in each case and not as arbitrators under the Act appointed under s. 29 (a) either by general order or by s. 29 (d) for the particular matter. (c) The deputy exercises the very power of the judge himself and not a delegation of a portion of it.

County Court
Jurisdiction

But the County Court jurisdiction is that to which the overpowering bulk of the cases come, and here the judge and

(a) W. C. R. 1907, 1. 32 (7).

(b) *Gibson v. Wormald & Walker, Ltd.*, 30 T. L. R. 152, [1904] 2 K. B. 40.

(c) W. C. R. 1907, 1. 29. *Post*, 730.

the arbitrator appointed by him have all the powers "as if the proceedings were an action in the County Court" (a) Chap. X
County Court
Jurisdiction

The Court to be resorted to is the "court of the district in which all the parties concerned reside, or if they reside in different districts, the district prescribed by rules of Court without prejudice to any transfer in manner provided by rules of Court." (b)

In *Rex v. Owen* (c) the judge declined to exercise jurisdiction, on the ground that the respondent lived in Glasgow, and had been served there, while the appellant lived and the accident happened in Newport, in Monmouthshire, in the district of the Monmouth County Court. In the view of the judge the word "district" in the clause meant the district of a County Court as mentioned in the County Court Acts, which only apply to England and Wales. A rule calling on the judge to show cause why he should not hear and determine the matter was made absolute by a Divisional Court (Lord Alverstone, C.J., Darling and Channell, JJ.) holding that the words "if they reside in different districts" are wide enough to include the case of a person residing in Scotland, and that the County Court judge had jurisdiction to determine the compensation. "I am clearly of opinion," says Lord Alverstone, C.J., (d) "that, where the parties are resident in different districts in the United Kingdom, the Court within the district of which the accident happened has jurisdiction, and that the procedure as to service of proceedings being effected by registered letter is applicable to the whole area which is within the ambit of the Act." The same point had been before the Court of Appeal in *Haddock v. Fisher*

(a) Second Sched. (4).

(b) Second Sched., par. (11). *Ante*, 439. The rules of Court relevant are W. O. R. 1907, i. 73 (1). *Post*, 759.

(c) [1902] 2 K. B. 436.

(d) *At* 441.

Chap. X.
County Court
jurisdiction
Transfer of
proceedings.

& Sons, (a) but no decision was given on it, as the parties agreed to try in the County Court.

The judge of any court in which any matter is pending may transfer it to any other court. (b)

Where any matter under the Act is undertaken by the County Court judge, or by the arbitrator appointed by him under the jurisdiction conferred by the Second Sched., par. (3), the officer of the County Court thereupon becomes bound to the performance of all incidental duties as if they were part of the duties of the County Court, and power is conferred (c) for the making of rules of practice on the five judges of the County Courts appointed for the making of rules under sec. 161 of the County Courts Act, 1888. (d)

No Court fees
payable.

No court fees are payable by any party in respect of any proceedings under the Act prior to the award, save those authorised by the First Sched., par. (15), on application to the Court by both parties for an order to refer the matter to a medical reference (e). The fee is not to exceed £1, and is to be calculated at the rate of 1s. in the pound on twenty-six times the amount of the weekly payments claimed by or payable to the workman. (f)

In Ireland, the recorder of any city or town is comprehended in the expression "County Court judge," and an appeal lies from the Irish Court of Appeal to the House of Lords. (g)

At the hearing of any arbitration or special case the judge is to make a note of any question of law raised and

(a) Times, new paper, 5th May 1906. 2 W. C. C. 13.

(b) W. C. R. 1907, i. 55. Post, 561.

(c) Second Sched., par. (22). Ante, 379. (d) 51 & 52 Vict. c. 43.

(e) Second Sched., par. (13). Ante, 340.

(f) W. C. R. 1907, i. 51 (9). Post, 716.

(g) Second Sched., par. 13. Ante, 342.

of the facts bearing on it and of his decision on it, and of his decision in the arbitration or on the hearing of the case. ^{County Court jurisdiction} Chap. X. He is to supply a copy at the expense of any party requiring one, and must sign the copy (a)

Where an award or a memorandum under Second Sched., par. (9), or a certificate under sec. 1, sub-s. 4, has been recorded and any party desires to take subsequent proceeding he must first get a certified copy of the award, memorandum or certificate, and must file it in the Court in which he wishes to proceed, and the registrar of that Court must treat it as if it had been an award made in the Court (b)

Provisions for the transfer of proceedings and the transfer of money paid into Court are made by rr. 75 & 76, (c) under the authority of the First Sched., par. (6).

(8) MEDICAL EXAMINATION AND MEDICAL REFERRALS.

The power of compelling the workman to submit himself to examination by a qualified medical practitioner when a notice of claim has been given by the workman (d) appropriately comes under the heading of Procedure

There is no power at common law to compel any one personally injured by accident to submit to medical examination (e). A power is given to a limited extent by the Regulation of Railways Act, 1868 (f) which provides for the making of an order that the person injured in an accident on a railway may be examined by a "duly qualified medical practitioner named in the order and not being a witness on either side."

(a) W. C. R. 1907, r. 31. *Post*, 733 (b) Ib r. 71 *Post*, 760

(c) Ib (d) First Sched., par. (1) *Ant*, 428

(e) The English common law is thoroughly considered in *Union Pacific Ry. Co. v. Hotford*, 141 U. S. (31 Davis) 250

(f) 31 & 32 Vict. c. 119, s. 26.

Workmen's Compensation Act, 1906

Chap. X.
Medical
examination
and medical
referees.

In the case now under consideration by the provisions of the Act, the employer may (1) require the workman to submit to examination so soon as he has given notice of an accident. If he refuses, or in any way obstructs the examination, the employer or other person may apply to the judge or arbitrator to stay proceedings in the arbitration until such examination has taken place, (a) (2) Again, where the workman is receiving payments under the Act he may be required by the employer from time to time to submit himself for examination; with the same consequences if he refuses, (b) The "duly qualified medical practitioner" to whom the workman is to submit himself for examination is practically the employer's doctor, and the employer has to pay him. And (3) if after the case has been referred to a medical referee the workman refuses to submit himself, his right to compensation or to take or prosecute any procedure or to any weekly payment is suspended till the examination has taken place, (c)

The medical referee is a "legally qualified medical practitioner," appointed by the Secretary of State, and paid subject to the sanction of the Treasury by moneys provided by Parliament and subject to regulations made by the Treasury, and cannot act as referee if he has been employed in the case by either party (d)

Where the application for suspensions of proceedings or weekly payments on refusal to submit to examination is made to the judge, either in or out of Court, notice shall be served on the workman five clear days at least before the hearing of the application, unless the judge or registrar shall give leave for shorter notice, (e)

(a) First Sched., par. (1)

(b) Trust Sched., par. (14).

(c) *Ib.*, par. (15)

(d) S. 10 (1). *Ante*, 317

(e) W. C. R. 1907, r. 55. *Post*, 747.

The rules only apply to the Act so far as it affects the County Court or an arbitrator appointed by the judge of the County Court, and proceedings in the County Court or before any such arbitrator, ^{Chap. X.} ^{Medical examination and medical referees.} So that where proceedings are pending before a committee or a private arbitrator the application is in each case to be made to such committee or arbitrator ^(a) If notice of an accident has been given but no proceedings are pending, the application is to be made to the judge, and the costs are incidental to the arbitration and in the discretion of the committee or arbitrator. ^(c)

In all cases outside the rules, if the fact of the requisition having been made, or of the workman having refused to comply is disputed, the disputed fact must be established to the satisfaction of the arbitrator, who may require such notice to be given as is reasonable in the circumstances; since he is bound by no other rules of procedure than those of good sense and fairness. The objection then goes to the root of his jurisdiction. He is not empowered to dispense with the examination or to modify it in any way, and after proof of the facts of the requisition and the refusal, to the satisfaction of the arbitrator, no further step can be taken till the medical examination has been held. The rule is imperative, "he *shall*, if so required by the employer, submit himself for examination." "If he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation and to take or prosecute any proceeding under this Act in relation to compensation *shall* be suspended until such examination has taken place."

The expression "a duly qualified medical practitioner" ^{Duly qualified medical practitioner.} has to be interpreted by reference to the Medical Act,

(a) W. C. R. 1907, r. 1 (1). *Post*, 715. Cp. *Mountain v. Parr*, [1899] 1 Q. B. 805.

(b) W. C. R. 1907, r. 55 (2).

(c) Second Sched., par. (7).

Chap. X.
Medical examination and medical records

1858, (a) which provided for a system of registration, and that the words "legally qualified medical practitioner," or "duly qualified medical practitioner," or any words importing a person recognised by law as a medical practitioner or member of the medical profession when used in any Act of Parliament, shall be construed to mean a person registered under this Act (b)

Sec. 27 of the Medical Act, 1858, provides for the publishing of a register, which is to be called "The Medical Register," a copy of which, for the time being, purporting to be printed and published under the direction of the Medical Council, shall be evidence in all Courts that the persons therein specified are registered according to the provisions of this Act (c)

Workman cannot impose terms as to his examination

Osborn v. Vickers, Sons & Maxim, (d) in the County Court, is one of those extraordinary decisions occasionally met with in that forum. The applicant was injured in the course of his employment, and the respondents made him an allowance for some time after the accident, but being advised by the medical men employed by them that he had completely recovered they ceased to do so. The workman, who had given no notice of action as required by the Workmen's Compensation Act, 1897, sec. 2, then filed a request for arbitration. The respondents took no

(a) 21 & 22 Vict. c. 91. There are various amending Acts down to 29 & 30 Vict. c. 18, s. 6, which provides that a registered medical practitioner shall, save as in the Act so mentioned, be entitled to practice medicine, surgery and midwifery in the United Kingdom, and to receive in respect of such practice any expense or charge in respect of medicament or other appliances, or any fees to which he may be entitled.

(b) 21 & 22 Vict. c. 90, s. 31. The Court of Queen's Bench held that registration to be effected must be before action brought, *Lemon v. Houselo, L. R. 10 Q. B. 16*, though not necessarily at the time the attendance is rendered, according to *Turner v. Royall, 11 C. B. (N. S.) 329*. This latter case is dissented from by Lord Coleridge, C.J., and Denman, J., in *Howarth v. Breatley, 1912 B. D. 303*.

(c) Cf. *Pedgitt v. Chevalier, 8 C. B. (N. S.) 240*.

(d) [1900] 2 Q. B. 91.

objection to the claim on the ground that no notice had been given, but objected that, as the appellant had recovered, they were not liable to pay further. They then required him to submit himself for examination by a duly qualified medical practitioner under the Act. He refused unless the respondents "would pay for the attendance at the examination of a medical practitioner on his behalf, as well as the medical practitioner employed by them." (a) Thus they refused to do. On the day fixed for the hearing the respondents applied to the County Court judge to suspend the proceedings under the rule. The County Court judge ordered that the appellant should submit himself for examination under the rule, "on condition that the appellants (the respondents) would pay the fee of one guinea for the attendance at the examination of a medical practitioner on the respondent's behalf." The employers appealed, and their appeal was allowed. Collins, L.J., said: (b) "The contention for the respondent [the working man] is that, having started the proceedings to obtain compensation without having given any notice of the accident as required by sec. 2, and the appellants not having taken any objection to the proceedings on that ground, the respondent is entitled, in answer to the appellants' claim that he should submit to a medical examination under par. (3) of the First Schedule to the Act, to turn round and say that the giving of a notice of the accident is a condition precedent to the obligation to submit to a medical examination under the section. I think that this is an impossible position for the respondent to take up. . . . I do not think that the County Court judge had any jurisdiction to impose upon the appellants such a condition as he did." (c)

(a) *L. c.* at 92.

(b) *L. c.* at 94.

(c) As to the procedure by which a suspension of the proceedings may be obtained: *W. C. R.* 1907, i. 55. *Post*, 747. *Form* 52. *Post*, 822.

Chap. X.

Medical examination and
medical referees
Workman to submit to
examination

By par. (1) as we have seen, (a) the employer may require the workman to submit himself for examination where the workman has given notice of the accident, with a view to the condition of the workman being ascertained for the purposes of the assessment of compensation. The workman may thereupon refuse to submit himself for medical examination, otherwise than in accordance with regulations (b) made by the Secretary of State, (c) which provide that when he has given notice of accident he shall not be compelled to submit to examination except at reasonable hours. After the first month the workman is only bound to submit himself to medical examination against his will, "once a week during the second, and once a month during the third, fourth, fifth and sixth months after the date of the first payment of the award as the case may be (this is in the case of the award of a committee or arbitrator, and thereafter once in every two months." This regulation is probably directed against applications like that in *Bard v. Kane*, (d) where a workman refused to come from Ireland to Scotland to be examined three times in two months without payment of his expenses. It was however held that he had not refused to submit himself for examination.

Malingering

Where the workman has been awarded payment of a weekly sum it may happen that he comes under the suspicion of malingering. The employer may then require him to submit himself to a new examination for the purpose of certifying whether the weekly payment ought to stop under par. (11). The workman may, however, refuse to submit himself for examination to the employer's practitioner, or may decline to be bound by the certificate he

(a) *Ante*, 676.

(b) The regulations are given, *post*, 898.

(c) First Schedule, par. (16). *Ante*, 331.

(d) 7 F. 461.

gives. In this case he may suggest to go before the referee. Chap. X.
 To this course both must agree and join in the application.
 The rules require that the application "shall be accompanied Mode of examination of referees
 by a copy of the report of every medical practitioner who
 has examined the workman, either on behalf of the
 employer or on the selection of the workman." (a) This is
 probably under that paragraph of the Schedule (15) which
 prescribes that "rules of court may be made for prescribing
 the manner in which documents are to be furnished or served
 and applications made." If the workman on being served
 with a copy of order refuses to submit himself for examination,
 his right to compensation is suspended until such
 examination takes place. (b) Where a right to compensation
 is suspended no compensation is payable in respect of
 the period of suspension. (c)

If the workman submits to examination by one of the Medical certificate.
 medical referees appointed under the Act (d) the certificate he
 gives of his condition is conclusive. (e) In this certificate
 the referee certifies "his fitness for employment, specifying
 where necessary the kind of employment for which he is fit."

In the rules to the former Act, besides the employer,
 "any person by whom the employer is entitled to be
 indemnified," was mentioned as entitled to require the
 workman to submit himself to examination. These words
 are omitted in the rules as now drawn. In the case of the
 bankruptcy of the employer the insurers are substituted for
 him, and are to "have the same rights and remedies and
 be subject to the same liabilities as if they were the

(a) W. C. R. 1907, r. 51 (2).

(b) First Schedule, par. (15). W. C. R. 1907, r. 51 (5).

(c) *Ib.* par. (20). *Ante*, 331

(d) *Ib.* par. (15). *Ante*, 332

(e) *Ib.* par. (15). *Ante*, 332

Chap. X

Medical examination and medical referees

employer." (a) But in any case the employer would be bound on a suitable indemnity, being tendered to him to allow the use of his name. The omission of the words is therefore insignificant.

Thompson & Sons v. North-Eastern Marine Engineering Co.

This point is touched on by Kennedy, J., in *Thompson & Sons v. North-Eastern Marine Engineering Co.* (b) thus: "In some cases the workman recovers from the accident, and the Act in contemplation of that provides for a right of review of the amount of compensation: but while giving to the person entitled to the indemnity the right of having the man examined, it has not, so far as I can see, given to the person liable to pay the indemnity—except only in the case of insurers—the right to have the amount payable for compensation reviewed. It has been contended, therefore, that such a person might be liable on his indemnity even after the workman was quite well, if the employer chose to go on paying him compensation under his agreement. The answer I think is that, according to the general law of indemnity, the person indemnifying could in such a case compel the employer to let him use his name in any proceedings to enforce a review." (c)

Obstructs.

The meaning attaching to the word "obstructs" was before the Court in *Finnie v. Duncan* (d). A workman in receipt of weekly payments went to Australia. He left no information of his whereabouts and his solicitor denied having any information about him. The Court suspended the weekly payment, holding that the workman was obstructing his examination.

It was contended in *McAvan v. Bonase Spinning Co.* (e) that

(a) S. 5 (1).

(b) [1903] 1 K. B. 428, 437.

(c) *Evans v. Cook*, [1905] 1 K. B. 53; *Greenwood v. Hawkins*, 28 T. L. R. 72.

(d) 7 F. 254.

(e) 3 F. 1048, 38 Sc. L. R. 772.

the certificate of the medical referee is conclusive only as to the actual condition of the workman and as to whether that actual condition arose from, and is the result of, the injury. A workman was required to submit himself to a medical examination. He did so, but not being satisfied with the certificate given, he submitted himself to a medical referee. The referee's report stated that the workman had recovered from his injuries, and would probably never be capable for hard manual labour but only for light employment, but that this disability was not connected with his injuries. The Court of Session (Lord Young dissenting) held that this finding was binding on the arbitrator, who had no choice but to make an order terminating the weekly payments which the workman had been receiving under the Act in respect of an injury. This is embodied in the First Schedule par. (15): that "that certificate shall be conclusive evidence as to the matters certified".

Chap. X
Medical examination and medical referee
Medical certificate, how far binding

The conduct of the employers in *Field v. Langden & Sons (re)* in demanding a medical examination was held by Collins, M.R., (4) "a clear admission of liability by them"; he adds that with the conduct of the workman "in submitting to that examination, there was conclusive evidence, if the question had arisen, of the existence of an agreement."

Demanding medical examination as admission of liability

In *Neagle v. Nixon's Navigation Co., Ltd.* (c) the workman received compensation by arrangement with his employers. After a while, having reason to think that he had recovered, they required him to submit to an examination by a medical practitioner provided by them.

Neagle v. Nixon's Navigation Co.

(a) [1902] 1 K. B. 17.

(b) *L. c.* at 55.

(c) [1901] 1 K. B. 339, with which is reported, *Edwards v. Gue & Keen & Scottolds, Ltd.*

Chap. X. He did so submit himself, and the medical practitioner certified that he had recovered. The employers gave him notice of that certificate and of their intention to discontinue the weekly payments to him. He thereupon instituted proceedings for the purpose of having compensation assessed. The employers then applied for a stay till the workman had submitted himself for examination by a medical referee. The County Court judge granted the application. The Court of Appeal however overruled him. The only examination that was contemplated as compulsory was the examination by the medical practitioner provided by the employer. If the workman is dissatisfied by that he has an option to submit himself for examination to a medical referee; if he does so the decision of the referee is conclusive and binding on both parties, but he is not bound to submit. Since this decision the provision of the Act of 1906 dealing with this has been so drawn that after the workman has concurred in referring his case to a medical referee he may be visited with the penalty of suspension of the weekly payment if he refuses to submit to the examination. (a)

Is the medical
report
confidential?

In the Southwark County Court the judge made an order in the case of *Bowlen v. Barron Brothers* (b) for the examination by a medical referee of a workman who had been in receipt of a weekly payment, on an application to review the same. The report was handed to the judge, and he stated the purport of it. The employers' solicitor then asked for a copy. This request was refused, on the grounds that the reports were privileged, and only for the judge.

The learned judge's ruling, however, appears inconsistent

(a) First Schedule, par. (16). *Ante*, 332.

(b) 3 W. U. C. 215.

with the statutory regulations, (a) Reg. 13 providing that Chap. X.
if the judge direct the parties may inspect the report. ^{Medical exami-}
On an application under the rule, it is manifestly no answer ^{cation and}
to say that inspection could not be given on account of the ^{medical referee.}
privileged nature of the document though an absolute
one to say that inspection should not be given because a
direction of the judge was necessary to permit it, when
direction he refused to give.

Morton & Co., Ltd. v. Woodward (b) is also inconsistent ^{Morton & Co.}
with the ruling of the judge of the Southwark County ^{Woodward,}
Court. In the report of that case in the Law Reports (c)
the report of the medical referee is set out in full.

Though the general drift of this case is that a "report"
under Second Schedule, par. (15), is not conclusive, there
are some expressions in the judgment of Mathew, L.J.,
in this particular that would lean to that construction.
Probably some confusion was in the minds of the judges
between the effect under the Act of 1897 of the First
Schedule, par. (11), and Second Schedule, par. (13). Where
the Act provides that evidence is to be conclusive it makes
it so, but the duty of the medical referee to report is
nowhere directly or by inference raised into a power to
decide.

By the rules, when any matter is submitted to a
medical referee for report, the judge may order the injured
workman to submit himself to examination by the medical
referee in accordance with the Regulations of the Secretary
of State. (d) The reference is to be in writing, (e) and to
state the facts and a general statement of the medical

(a) Medical Referees Reg., 1898. Now r. 26 of Regulations of 24th
June, 1907. *Post*, 871.

(b) [1902] 2 K. B. 276. (c) *L. r.* at 277. (d) W. C. R. 1907, r. 53.

(e) Regulations as to Ref. to Medical Referees, 24th June, 1907, Reg. 21.

Chap. X. evidence given on behalf of the parties (*a*). The report of the referee is also to be in writing, (*b*)

Medical exami-
nation and
medical reports.

How far
conclusive

*McAvan v. Bence
Spinning Co.*

In *McAvan v. Bence Spinning Co., Ltd.*, (*c*) the appellants first called on the respondent in the terms of the First Schedule, par. (11), to submit himself to medical examination, which he did, and was examined by the appellants' medical man, who reported him cured. He expressed himself dissatisfied with this report, and the matter was then referred to the medical referee, who reported him recovered, but "will probably never be able for hard manual labour, but only for light employment. This disability is not connected with his late injuries, but is the result of deficient natural vigour of constitution, together with advancing years." "It cannot be doubted for a moment," said the Lord Justice Clerk, "that if the certificate had stated that the workman was still affected by the accident so as to be disabled wholly or partially from work, the appellants could have been compelled to continue to pay compensation, and would not have been allowed to lead evidence to prove that the certificate was erroneous. Here, equally, I hold that the certificate declaring that he has recovered from his injuries, and that any disability for hard work under which he may suffer is not connected with his late injuries, is conclusive upon the question of his right to further compensation."

*Goulay Brothers
v. Ferrier.*

This was followed by *Goulay Brothers v. Ferrier*, (*d*) where the sheriff-substitute remitted to a medical referee to report on the case of the applicant, a labourer, whose eye was injured. The referee reported that the power of vision of the injured man was reduced by one-

(a) Regulations as to Ref. to Medical Referees, 24th June, 1907, Reg. 21.

(b) *Ib* Reg. 23

(c) 3 P. 1018.

(d) 39 Sc. L. R. 453

half through the accident, which condition would be permanent; that the workman would never be able for any work for which unimpaired vision was essential, but was quite able to undertake his ordinary work as a labourer. The Court held the case concluded by McAvan's case. "In ordinary circumstances," continued the Lord Justice Clerk, "this view would lead to a final decision: but in the present case, where there has been an injury to the sight, there may be ground for holding that, although the respondent is at present in no way incapacitated for his ordinary work, there may be supervening development of injury to eyesight, and this seems to me to be a reasonable contention. I would propose, therefore, that the course should be followed which was taken in some other cases under the Act, of keeping the case in life by awarding a nominal weekly sum."

Chap.X.

Medical examination and medical reports

A judge of County Courts may, if he think fit, summons a medical referee to sit with him as assessor (a). This power may be set to work on the initiative of any party to the arbitration. (b) The medical referee must be one of those appointed for the area comprising the district of the Court in which the arbitration is pending.

(9) EMPLOYER'S INDEMNITY UNDER SEC. 6

The case may occur of the workman being entitled to recover under the Workmen's Compensation Act, 1906, in respect of an injury arising out of and in the course of the employment, but the injury may have been inflicted by some third person in such circumstances that the workman has a right of action against him independently of the Act.

Indemnity from third person

(a) Second Schedule, par. (6)

(b) W. C. R. 1907, r. 52 (1). Form 45. Form 46. Post, 818.

Chap. X

In remedy under
s. 4.
No double
recovery.

Scope of the
section.

Scope of the
words.

It is obvious that the Act never intended that the workman was to have a double recovery for his injuries. If he is compensated at law, then the provision made by the Act is not needed. If the provision by the Act is more advantageous than compensation by law, he may take the advantage most beneficial for him, but in no circumstances is he to have both damages by law and the provision under the Act (*a*). Yet he has his choice which remedy he is to pursue (*b*). If he issues a writ against the actual wrong-doer, this, as a "proceeding," will disabie him from claiming under the Act (*c*). But if he claims under the Act, and compensation is paid by the employer, the employer becomes relegated to all the workman's rights against the wrong-doer, who would have been liable had common law process been resorted to. Consequently the workman loses his claim against the wrong-doer, to which his employer having paid compensation becomes entitled. The section gives the employer no remedy beyond what he already has at law. It guards against an attempt at a double recovery by the workman, and it indicates an employer's resort against the wrong-doer.

The section includes all cases of "legal liability in some person other than the employer," *i.e.*, either a stranger or a fellow-workman, or a workman engaged in some collateral occupation.

In *Thompson & Sons v. North Eastern Marine Engineering Co., Ltd.* the workman and the employer had made an agreement for the payment of compensation without any further

(a) *Cp. Elliott v. Legge*, 1902 2 K. B. 81 per Lord Alverstone C.J., at 86.

(b) *S. 6, ante*, 308.

(c) *Tung v. G. N. Ry. Co.*, 18 T. L. R. 566. See per Kennedy, J., *Thompson & Sons v. North Eastern Marine Engineering Co.*, [1903] 1 K. B. 428 at 431.

(d) [1903] 1 K. B. 428.

"proceedings" than notice of the accident and the claim for compensation. It was contended that this was not enough to bring the case within the Act so that the employer could obtain indemnity under sec. 6, over against the original wrongdoer. Kennedy, J., however, was of opinion that the words of the section in the Act of 1897, "If compensation be paid under this Act," were decisive on this point. In the Act of 1906, the point is made clearer by the substituted expression "If the workman has recovered compensation under this Act the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under the section of this Act relating to subcontracting, shall be entitled to be indemnified."

Chap. X.

Indemnity under

The question what is the compensation recovered under the Act that is sufficient to hold the workman to the exercise of an option against the employer and to the exoneration of the person "other than the employer" was raised in *Oliver v. Nautilus Steam Shipping Co.* (a) At the time of the injury the workman, who was in receipt of wages at the rate of £2 a week, wrote informing the employers of his injury. The agent of an insurance company with whom the employers had insured subsequently called on the workman at the infirmary and paid him at the rate of £1 a week, and took from him a form of receipt as in *Rendall v. Hill's Dry Docks & Engineering Co.* (b) Subsequently all receipts were given with the words "without prejudice" on them. On leaving the infirmary the workman issued a writ against the defendants for whom his employers were doing work when he was injured. The defendants said that the plaintiff had already recovered compensation against his employers and could not subsequently claim damages against them. This view was

What is the compensation that the workman has recovered?

Oliver v. Nautilus Steam Shipping Co.

(a) [1903] 2 K. B. 630

(b) [1900] 4 Q. B. 215

Chap. X
Indemnity an $\frac{1}{2}$ r
s. 6

taken by the judge at the trial and judgment was entered for the defendants. This was reversed in the Court of Appeal. Romer, L.J., did not think that it could be said, "that a workman must necessarily be held to have exercised the option given to him as against his employers or against the stranger liable merely because he has taken some proceedings either at law against the stranger or under the Act as against the employer. Whether the proceedings would, in fact, be such as to bind the workman must depend upon the circumstances of each case, including a consideration of what has resulted from the proceedings, and whether or not any injury will result if the proceedings are held not to irrevocably bind the workman." Romer, L.J., threw out the suggestion that "proceedings by a workman against his employer for compensation should not be held to irrevocably bind the workman in the exercise of the option given him by sec. 6 unless those proceedings have resulted in some compensation as such being paid to and received by the workman in such a manner so as to bind both parties." In the case in point we have compensation paid to and received by the workman, but the L.J. vouchsafes no information what makes "such a manner as to bind both parties;" beyond holding that in the case before him that standard was not attained. At first glance it may not be evident why the third party troubled to contest the workman's right of action against them: since they would be liable to the employers for what they paid to the workman, *i.e.* the £1 a week during disability and the costs. (a) But if the direct action were not barred they were liable to common law damages, which in this case were agreed at £375, and costs.

A question has been asked whether this sec. 6 extends

(a) Proceedings is not to be confined to legal proceedings. Page v. Burtwell, [1908] 2 K B. 758. Great Northern Ry. Co. v. Whitehead & Co., 18 T. L. R. 510. *Post*, 694.

to cases where the employer has an action on his contract with, say, the machinery manufacturers who have supplied him with machinery, the breakdown of which has caused the injury to the workman, who yet himself would not have a right of action against them. The answer is No. The opening words of the section (which by the way is in a *Workman's Compensation Act*) are, "where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof," are obviously used from the point of view of the workman. The employer is liable in the case put to pay damages to the workman. The manufacturer is liable to pay to the employer, but not to the workman, and the enactment cannot be shifted from its reference to the workman and to create under the Act a remedy by the employer on his contract with the manufacturer. "It may further be noted that all questions as to the right to and amount of any such indemnity shall in default of agreement be settled by action," (c)

Chap X.

Indemnity under
s. 6
Does the section
include con-
tributory rights?

Rule 21 (1), (2) however, provides "that where a respondent claims to be entitled under sec. 6 he 'shall file,' and serve a notice of his claim in accordance with Rule 19." Moreover, Form 23(c) contains two sentences at the end—*"Take notice that if you wish to dispute the applicant's claim as against the respondents, or your liability to the said respondents, you must appear before the judge . . . at the time and place mentioned in the notice,"* etc. The other—*"In default of your appearing you will be deemed to admit the validity of any award made in the arbitration,"* etc., *"and your own liability to indemnify,"* etc. (d)

(a) S. 6 (2)

(b) W. O R 1907 Ante, 727

(c) Post, 801.

(d) *Evans v. Cook*, [1905] 1 K. B. 53

Chap. X. What, too, is the exact meaning to be attributed to
Indemnity under
s. 6 par. (5) of Rule 21: "Nothing in this rule shall empower the judge to decide (otherwise than by consent) any question as to the liability of the third party to indemnify the respondent, or to make any award in favour of the respondent against the third party or to make any further or other order than that the third party shall not be entitled in any further proceedings between the respondent and such third party to dispute the validity of the award as to any matter which the judge has jurisdiction to decide in the arbitration as between the applicant and the respondent"?

Two states of circumstances may arise; the respondent may not cite the person liable to indemnify. Then the rule would seem otiose; or the person liable to indemnify would take no notice of the citation, and it so how can the rules of the County Court straighten his rights in the action which he is entitled to require to be brought? The rules, note, that may be made are only valid "so far as it [the Act] affects the County Court or an arbitrator appointed by the judge of the County Court and proceedings in the County Court or before any such arbitrator" (a).

Johnson v. Lindsay Johnson v. Lindsay (b) illustrates the general operation of sec. 6. Builders contracted to build a block of artisans' dwellings, certain finished portions of the houses were to be executed by workmen working under an independent contract with the owners. Both groups of workmen were engaged upon the building at the same time, though the work they were respectively engaged on was not a common enterprise. Some of the workmen's workmen let fall a basket and injured one of the builders' workmen. It was held that at common law the injured workman had a right of action against the workmen whose men did the injury

(a) Second Schedule, p. 11. (12). (b) [1891] A. C. 371.

in the scope of their employment. He would also, at common law, have had an action against the nonfounders' workmen who injured him (a). But he would not have an action against his employers, either at common law or under the Employers Liability Act, 1880.

Chap. X.
Indemnity made.

By this sec. 6, since the accident was "caused under circumstances creating a legal liability in some person other than the employer," and arose "out of and in the course of the employment" of the builders' workman he becomes entitled to compensation from his employers in respect of an accident under the Act, and an option is given to the injured workman either to pursue his other remedies or to seek compensation under the Act.

How affected by the present Act

Assuming compensation to be obtained under the Act, the employers are put into the place of the injured workman, so far as relates to pursuing his other remedies. They have an action against (1) the nonfounders—the employers of the workmen doing the injury; (2) against the workmen themselves, and proceedings against both could be taken on one writ. (b)

In a case of this sort, however, it would doubtless be better for the workman to pursue his remedy by the common law, whether his injury were severe or slight, since by the common law he would not be limited in his claim, while the nonfounders, against whom his claim would substantially be, would not unlikely be as solvent as his own employers.

To illustrate the case where a complete stranger to the work has caused injury to a workman, is not so readily done.

Illustration of injury done by a stranger

(a) *Ante*, 13

(b) Jessel, M.R., in *Eaglefield v. Londonerry* (Macquis ob), 1 Ch. D. 693 at 708, appears under the misapprehension that this could not always be done. See *Whitmore v. Waterhouse*, 1 C. & P. 383.

Chap. X. by means of an actual reported decision as in the instances
Indemnity under s. 6 just given, where a workman engaged in some collateral
 occupation or a fellow workman is concerned. An apt
 illustration is notwithstanding not wanting. Some years
 since a man, while working in his accustomed occupation at
 Wimbledon, was injured by a bullet shot at the rifle ranges
 there. Under the Act, compensation would now be payable
 by the employer, assuming the employment was a contract
 of service, and the employer would stand in the injured
 man's shoes in respect of any action of trespass or negligence
 the injured man might have against his injurer. (a)

Great Northern
 Railway Com-
 pany v
 Whitehead

See, *it* in the 1897 Act was the subject of decision in
Gt. N. Ry. Co. v. Whitehead & Co., Ltd. (a) The defendants
 were in the habit of sending barrels of beer by the plaintiffs'
 line; and on the occasion of the accident they sent a van
 loaded to be conveyed on "station to station terms," under
 which the carriers undertook the loading and unloading.
 While the defendants' servants were engaged in rolling a
 barrel from the van down a plank to the platform, the horses,
 which were unattended, started forward, and the plank,
 which was not secured, slipped, and this caused it to spring
 and to injure a servant of the plaintiffs. The man recovered
 £78 11s. 3d., the amount of weekly payments under the
 Workmen's Compensation Act, 1897, and the employers
 claimed indemnity from the defendants, against whom their
 workman had an action for negligence at common law, of
 which they were subrogated to the benefits by sec. 6 of the
 Workmen's Compensation Act, 1897.

Costs occasioned
 by proceeding
 under the
 Workmen's
 Compensation
 Act, 1897,
 whether
 recoverable
 under
 indemnity.

The negligence alleged was the non-user by the
 defendants' servants of the proper appliance for unloading
 the van, and their failure to secure the plank used by them,

(a) *Stanley v. Powell*, [1891] 1 Q. B. 86, also illustrates the principle.

(b) 18 T. L. R. 810.

or to look after the horses. Darling, J., held the negligence proved, and gave judgment for the sum claimed. A question as to the costs then arose. The plaintiffs' workman, by claiming against his employers and not against the wrong-doers, had occasioned an expenditure of £10 17s. 2d - the costs of the arbitration—which the employers were ordered to pay in the arbitration. The plaintiffs now claimed this from the defendants in addition to the payments they had made to the injured workman. This was resisted, on the ground that the claim for compensation under the Act of 1897 had nothing to do with negligence at all. The section "said nothing as to indemnification with regard to costs," and there was "no jurisdiction to deal with them." Darling, J., "did not think the employer would be indemnified unless he received the compensation he had to pay and the costs he had been put to" he therefore allowed the costs. The decision seems inevitable, though the form of the report is unusual. It appears, superficially looked at, as if the learned judge, having decided the case, gave the costs of a proceeding not before him under his general jurisdiction over costs. This, however, was probably not so. The claim in the action was for a declaration that the plaintiffs were entitled to be indemnified by the defendants, and what appears in the report as an order as to costs was an integral portion of the decision—that the plaintiffs were entitled to be indemnified.

The consideration that the defendants are mercifully made liable for costs under the Act that in no case could they have had directly awarded against them, does not import any hardship. By hypothesis they were wrong-doers, liable to have a verdict for damages against them not weighed in golden scales--had they been originally made defendants. By the procedure adopted by the workman,

Chap X.
Indemnity under
"6"

Chap. X. the employer has a claim against them for a rigidly
 Indemnity under limited sum, which, in the run of instances, would probably
 s. 6 be much less than would have been given against them had unliquidated damages been sought. They, therefore, get the advantage of having the damages against them in the form of a liquidated sum + the cost of ascertaining the sum, and with the satisfaction of knowing that it has actually been paid.

Joint tort
 feaures

It may happen that compensation is payable in circumstances creating a legal liability in some person other than the employer, yet where the employer is jointly liable with such other person. The point then arises whether, supposing the employer pays the compensation under the Act, he becomes by doing so entitled to indemnity from his joint *tortfeasor*. At common law it is very clear that he would not be. (a) If it were argued that under this section there is a difference, and that the employer is by the section invested with the rights of the workman, and owes not for contribution in respect of the joint liability, but as the statutory assignee of the workman's right of action, limited only to the extent that the employer has had to pay compensation, the answer probably is that the object of the section is to enable the workman, with the least delay and expense, to recover compensation, for injury by accident arising out of or in the course of the employment, from the employer, even when the injury is caused by a stranger against whom the workman has a legal remedy; and that the operation of the section is not to give the employer rights of indemnity where he is now liable at law; but to give him a remedy over in cases where before the Act he was not liable, but where by the policy of the Act a liability is now imposed; that, in short,

(a) *Merryweather v. Nixan*, 8 T. R. 186, 1 Sm. L. C. (11th ed.) 398; see *Palmer v. Wick Co.*, [1894] A. C. 818.

the statute does not create new liabilities in the case of strangers, but merely regulates the method of enforcing existing liabilities. In so far as the relation of workman and employer exists, it does create new liabilities, but its effect is limited to this case.

If this view be correct, the section is only operative in those cases when, apart from the Act, the employer is under no liability.

The action which the employer has given to him is a statutory action for indemnity to the extent of the compensation awarded and the cost reasonably incurred in ascertaining it (*o*). He sues on a contract implied in law — a statutory contract of indemnity.

In this action he may be met with all the defences the same claim of the workman was open to. He may besides be met with the statutory defence that the compensation has not been paid under the Act, and that the claim for the statutory indemnity has consequently not arisen, or that the compensation if paid was not paid in discharge of any liability under the Act, and that the employer is not entitled to be indemnified in respect of the payment. The damages will sometimes have to take the form of the present value of a liability of some continuance, and will thus have to be the result of an actuarial calculation.

DETENTION OF SHIPS

Now that masters, seamen, and apprentices are brought under the Act it is necessary that there should be some procedure which, in the case of foreign ships, may secure their detention pending arrangements for the assurance

¹ *per* Moore & Blatchford, *Woolwich*, L. R. 5, 1 P. 227, *Hammerton v. Bussey*, 20 Q. B. D. 79 (1886). See the authorities summarized in the note to *Lampfold v. Birkhead*, 1 *See* L. J. (11 Feb. 1911).

Chap. X
—

of compensation payable on their claims. Not only so, but it may happen that injury may be done in dock to persons working on ships or about or concerned with them, and who are not seamen, but whose chance of obtaining compensation may depend upon the retention of the ship about which they have been working within the jurisdiction. Section 11(a) is enacted with the object of safeguarding people so situated. It provides that where the owners of a ship are liable to pay compensation under the Act the ship may in certain circumstances be held to answer

therefor.

If such a ship is found in any port or river of England or Ireland, or within the three-mile limit, a judge of any Court of Record in England or Ireland, upon it being shown to him by any person applying, in accordance with the rules of the Court, that the shipowners are probably liable, and that none of them reside in the United Kingdom, may order the detention of the ship. Any officer of customs or other officer to whom the order is directed is to detain the ship accordingly. The ship is to be detained until compensation has been paid, or alternatively security given, to be approved by the judge, or to abide the event of any proceedings that may be instituted, and to pay such compensation and costs as may be awarded. The procedure is set in motion by an application to the judge supported by an affidavit alleging (a) that the ship is within the jurisdiction and that none of the owners reside in the United Kingdom, and that such owners are liable to pay compensation under the Workmen's Compensation Act, 1906, and asking for an order to detain. The application may be made *ex parte* (b) but if the person intending to apply for

(b) See the section by reference to W.C.A. 1906, c. 35, s. 1.

(c) The judge shall and may cause to be sworn by him the applicant of the Court. W.C.A. 1906, c. 35 (1). *Post*, 745.

(d) *Form 26*. (e) W.C.A. 1906, c. 35 (1a).

Chap. X

applied to the detention of a ship under the foregoing provisions (a). If then a ship after detention, or after service of any detaining notice, goes to sea before it is released by competent authority, the master or the owner or any person who sends the ship to sea, who may be privy to the offence, shall be liable to a fine not exceeding £100. If any government officer in the execution of his duty is taken to sea, the owner and master of the ship are each liable to pay all expenses of and incidental to taking the officer or surveyor to sea, or £100, or a penalty not exceeding £10 a day till the return of the officer or surveyor, if the offence is not prosecuted in a summary manner. When a ship is to be detained the customs officer is to refuse to clear that ship outwards or to grant a transite to that ship.

Shipowners' Negligence (Remedies) Act

There is no express power given in the Workmen's Compensation Act, 1906 to detain a ship which is alleged to have caused an injury in respect of which an employer has paid compensation and seeks to be recompensed by the shipowner by way of indemnity. But this power is conferred by the Shipowners' Negligence (Remedies) Act 1905 (b). By s. 1, "if it is alleged that the owners of any ship are liable to pay damages in respect of personal injuries, including fatal injuries caused by the ship or sustained on, in or about the ship in any port or harbour of the United Kingdom in consequence of the wrongful act, neglect or default of the owners of the ship or the master or officers or crew thereof, or any other person in the employment of the owners of the ship, or of any defect in the ship or its apparel or equipment," the same proceedings as to become applicable as we have already noted as applying in the case of the detention

of a ship under sec. 11. The phrase 'any person applying in accordance with the rules of Court' (a) which occurs in sec. 1 of the Shipowners' Negligence (Remedies) Act, 1905, (a) as well as in sec. 11, to denote the force to put the Act in motion is defined thus: "The words 'person applying' in this section shall include an employer who has paid compensation, or against whom a claim for compensation has been made under the Workmen's Compensation Act, 1897, as amended by any subsequent enactment or if he shows the judge that he probably is or will become entitled to be indemnified under that Act, and in such case this section shall apply as if the employer were a person claiming damages in respect of personal injuries."

The purview of the two provisions is different. The ship may be detained under the provision of the Workmen's Compensation Act whenever the owners are liable in the circumstances indicated in the section "to pay compensation under this Act," that is, in any case where "in any employment personal injury by accident arising out of and in the course of the employment is caused" to a workman. Under the Shipowners' Negligence (Remedies) Act, 1905, the ship can only be detained where the cause of detention alleged is a tort—personal injury caused by the ship or sustained on, in or about the ship in consequence of the wrongful act, neglect or default of somebody for whom the owners are answerable. Moreover, the injury must have been sustained in a port or harbor in the United Kingdom, while in the case of the Workmen's Compensation Act the liability to pay compensation may have taken place "in a British possession or in a foreign country."

(a) *Ibid.*, 38. (c) *See* (1).

(c) The Workmen's Compensation Act, 1897 is repealed by s. 16 (2) of the Act of 1906, repealed by The Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38.

Chap. X The needed adjustments by way of procedure are made
 — by the rules of Court, (c)

GENERAL PROVISIONS.

Appeal from
 Court.

Section 14 and Second Schedule, par. (17), deal with difficulties that might otherwise arise in the application of the Act to Scotland, and the latter provides for an appeal to the House of Lords. On the declaration of the rule of law by the House of Lords, even in an English case, the Scotch judges are bound (c).

Under sec. 9 of the Act of Session of 3rd June, 1898, the Court of Session directed a Sheriff to state a case on a question formally submitted to him, since the question was, or might involve, a question of law (c).

Report to
 Secretary of
 State.

There is a duty imposed on every employer in any industry that the Secretary of State shall direct to make the return to send to the Secretary of State a correct return specifying the number of injuries in respect of which compensation has been paid by him under the Act during the previous year and the amount of such compensation and such other particulars as to the compensation as the Secretary of State may direct under penalty of a fine not exceeding £5, (d). Any regulations under this section are to be laid before Parliament.

Expiring
 contract.

By sec. 15 (1) any contract (other than a contract substituting the provisions of a scheme certified under the Workmen's Compensation Act, 1897, for the provisions of

(c) S. 7 (1) (c) (d) = W. C. A. 1906, s. 13 (a) (ii) and (v). These are included under the Shipwreck and Seafarers (Remedies) Act, 1904, and in the form of notes to p. 706 (note, 1904).

(1) 1 p. 104 in c. Land C., 1900, A.C. 371.

(2) 1 p. 104 in c. 1900, A.C. 371.

(3) S. 12 (1) (b) (c), 1906.

that Act) existing at the commencement of the Act of 1906 whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment shall not for the purposes of the Act be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of the Act.

(2) Every scheme in force at the beginning of the Act shall, if recertified by the Registrar of Friendly Societies, have effect as if it were a scheme under this Act.

(3) The scheme is to be recertified if the registrar is satisfied that the scheme conforms to the provisions of the Act.

(4) But if any such scheme has not been recertified before the expiration of six months from the commencement of the Act, the certificate shall be revoked.

In *Wallace v. R & W Hawthorne Leslie & Co., Ltd.* (a) the Court of Session held that until "an old scheme is recertified by the Registrar of Friendly Societies it has not effect as if it were a new scheme under the Act of 1906, so far as regards workmen signing it after the commencement of the Act are concerned."

The Act of 1906 came into operation on the 1st July 1907. So far as relates to references to medical referees and proceedings consequential thereon, it applied from that date generally, but in other respects only when the accident happened before the commencement of the Act (b).

The previous Acts are repealed save as mentioned above. (c)

(a) 15 Sc. L. R. 547. (b) S. 16 (1). (c) S. 16 (2).

